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In the Supreme Court of the United States

Brian Burgeson, John Dorner, Brian Foster, Maury Gantman, Raymond Greve, Kelly Jackson, Richard Kim, Laura Loken, Moira Weyrich, Jose Mendez, Timothy McPhillips, Edward Pickell, Edward Plucinski, Maurice Smith, Jeffrey Sulkin, George Velisaris, Mike Wish and Michelle Zimmerman, in their individual capacities,

Petitioners,

v.

Marcella Richman, individually and as Special Administrator of the Estate of Jack B. Richman, deceased,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether courtroom security personnel executing a lawful judicial order within a courtroom and under the immediate direction and supervision of a judge are entitled to quasi-judicial absolute immunity from federal constitutional claims.

LIST OF PARTIES

The parties to this proceeding are petitioners/defendants deputy sheriffs Brian Burgeson, John Dorner, Brian Foster, Maury Gantman, Raymond Greve, Kelly Jackson, Richard Kim, Laura Loken, Moira Weyrich, Jose Mendez, Timothy McPhillips, Edward Pickell, Edward Plucinski, Maurice Smith, Jeffrey Sulkin, George Velisaris, Mike Wish and Michelle Zimmerman, in their individual capacities, and respondent/plaintiff Marcella Richman, individually and as Special Administrator of the Estate of Jack B. Richman, deceased.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners deputy sheriffs Brian Burgeson, John Dorner, Brian Foster, Maury Gantman, Raymond Greve, Kelly Jackson, Richard Kim, Laura Loken, Moira Weyrich, Jose Mendez, Timothy McPhillips, Edward Pickell, Edward Plucinski, Maurice Smith, Jeffrey Sulkin, George Velisaris, Mike Wish and Michelle Zimmerman (collectively "petitioners"), in their individual capacities, respectfully petition for a writ of certiorari to review the opinion and decision of the United States Court of Appeals for the Seventh Circuit filed on October 16, 2001.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit affirmed in part the decision of the United States District Court for the Northern District of Illinois denying petitioners' motion to dismiss. The Seventh Circuit's opinion is reported at 270 F.3d 430 (7th Cir. 2001) and is reprinted in the Appendix hereto at App. 1-App. 23. The district court's opinion is published at 2000 U.S. Dist. LEXIS 5861 and is reprinted in the Appendix hereto at App. 24-App. 41.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit from which petitioners seek review was issued on October 16, 2001. (App. 1-App. 23.) This petition was timely filed within 90 days of the issuance of that opinion. On October 29, 2001, the United States Court of Appeals for the Seventh Circuit granted petitioners' motion to stay the issuance of the mandate pending the filing of the subject petition in this Court.

The jurisdiction of this Court to review the decision of the Court of Appeals is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. §1983

> §1983. Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

55 ILCS 5/3-6017

> §3-6017. Sheriff custodian of courthouse and jail. He or she shall have the custody and care of the courthouse and jail of his or her county, except as is otherwise provided.

55 ILCS 5/3-6023

> §3-6023. Attendance at courts. Each sheriff shall, in person or by deputy, attend upon all courts held in his or her county when in session, and obey the lawful orders and directions of the court. Court services customarily performed by sheriffs shall be provided by the sheriff or his deputies, rather than by employees of the court, unless there are no deputies available to perform such services. The expenses of the sheriff in carrying out his duties under this Section, including the compensation of deputies assigned to such services, shall be paid to the county from fees collected pursuant to court order for services of the sheriff and from any court services fees collected by the county pursuant to Section 5-1103, as now or hereafter amended.

STATEMENT OF THE CASE

I. Background

Under Illinois law, sheriffs "have the custody and care of the courthouse and jail of his or her county, except as is otherwise provided." *See* 55 ILCS 5/3-6017 (2002). Illinois sheriffs "shall, in person or by deputy, attend upon all courts held in his or her county when in session, and obey the lawful orders and directions of the court." *See* 55 ILCS 5/3-6023 (2002). The duties of sheriffs are analogous to those of a common-law bailiff and are typical of the operations in many of our nation's courts. Sheriffs and bailiffs in other jurisdictions, particularly in our most populous states, have the same duty to maintain

security and order within courtrooms.[1]

On November 18, 1997, Michael Sheahan, the Sheriff of Cook County, Illinois ("Sheriff Sheahan" or the "Sheriff") and his deputy sheriffs had a statutory duty to preserve security in the courtroom of Judge Michael Jordan of the Circuit Court of Cook County, Illinois, and obey the lawful orders of Judge Jordan. On that day, respondent Marcella Richman appeared with her son, Jack Richman, before Judge Jordan on a traffic citation issued against her. (Am. Comp., count I at ¶¶11-12.) The case was called for hearing, and the court determined that the matter should be reset to a future date. (Am. Comp., count I at ¶¶11-12.) As he continued respon-

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[1] In federal courts, for example, United States marshals may employ bailiffs "to attend [to] the court [and] maintain order." *See* 28 U.S.C. §755 (2002). *See also* 28 U.S.C. §672 (2002) (stating that this Court may appoint a marshal to attend the Court at its sessions and execute all orders issued by the Court or a member thereof). Like Illinois law, New York law provides that sheriffs and their deputies attend upon courts. *See, e.g., Gribetz v. Evans*, 113 A.D.2d 376, 496 N.Y.S.2d 465 (N.Y. App. Div. 1985). California law "provides that county peace officer[s] includes employees of the sheriff's office who attend court sessions, preserve order in the courtroom, maintain the security of prisoners making court appearances, and take responsibility for jurors." *Biggers v. Workers' Comp. Appeals Bd.*, 69 Cal. App. 4th 431, 81 Cal. Rptr.2d 628 (Cal. Ct. App. 1999) *citing* Cal. Gov't. Code §20440 (2002). Florida sheriffs are obligated to "[a]ttend all terms of the circuit court and county court held in their counties." Fla. Stat. §30.15(1)(c) (2002). Texas law provides that bailiffs "shall attend each session of the court to which he is appointed and perform the official duties performed by sheriffs and deputies in the district courts of this state" and "shall also perform services requested by the judge." Texas Gov't Code Ann. §53.035(b) (2000).

dent's traffic case, Judge Jordan ordered respondent and her son to stop speaking. (Comp., count I at ¶13.) However, Mr. Richman continued speaking. (Comp., count I at ¶14.) As Mr. Richman continued, Judge Jordan ordered several deputy sheriffs to restrain Mr. Richman and take him into custody. (Comp., count I at ¶14; Am. Comp., count I at ¶14.) Mr. Richman continued to speak out. For each of Mr. Richman's successive attempts to speak out, Judge Jordan increased the penalty in successive increments of days in custody to a total of one hundred twenty days. (Comp., count I at ¶13.) At Judge Jordan's direction, several deputy sheriffs began to take Mr. Richman into custody and struggled to handcuff him. (Comp., count I at ¶¶15, 17 and 20.) Thereafter, one or more deputy sheriffs noticed that Mr. Richman had stopped breathing. (Am. Comp., count I at ¶21.) Emergency assistance was called. (Am. Comp., count I at ¶27.) Several paramedics subsequently entered the courtroom, administered CPR, and took Mr. Richman to the hospital where he was pronounced dead. (Am. Comp., count I at ¶27.)

II. Proceedings Below

On November 17, 1998, respondent Marcella Richman, individually and as Special Administrator of the Estate of Jack B. Richman, filed a complaint against petitioners alleging violations of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §1983 ("Section 1983"). The jurisdiction of the United States District Court for the Northern District of Illinois was invoked under 28 U.S.C. §§1331, 1343 and 1367.

On April 23, 1999, petitioners and their co-defendants, Sheriff Sheahan and the County of Cook (the "County"),

filed a 12(b)(1) and 12(b)(6) motion to dismiss respondent's complaint. Thereafter, on May 28, 1999, respondent filed an amended complaint that sought damages under Section 1983, Illinois' Wrongful Death Act, 749 ILCS 180/1 and Illinois' Survival Act, 755 ILCS 5/27-6.

After amendment, petitioners, Sheriff Sheahan and the County, adopted their previous motion to dismiss and, thus, moved to dismiss count I (Section 1983 against all petitioners), count III (Section 1983 against the four petitioners who allegedly restrained respondent Marcella Richman), count V (state law wrongful death claim against all petitioners and Sheriff Sheahan) and count VI (state law survival claim against all petitioners and Sheriff Sheahan) of respondent's amended complaint on the grounds of, *inter alia*, quasi-judicial absolute immunity. Petitioners argued in their motion that they were court security personnel executing a lawful judicial order within a courtroom while under the immediate direction, orders and supervision of a judge, and, thus, were entitled to quasi-judicial absolute immunity as to all actions brought against them in their individual capacities.

In addition, Sheriff Sheahan argued that the Eleventh Amendment barred respondent's official capacity claims in counts II and IV for failure to train and supervise deputy sheriffs because the Sheriff acted as an arm of the State of Illinois when training deputy sheriffs to perform duties as a state official such as the execution of court orders.

All petitioners and Sheriff Sheahan argued that the district court lacked subject matter jurisdiction over respondent's state law claims in counts V and VI on the grounds that the deputy sheriff petitioners acted as an arm of the State of Illinois when they enforced Judge Jordan's order to restrain Mr. Richman and, as a result,

respondent's state law tort claims were really tort claims against Illinois and under Illinois law, the Illinois Court of Claims had exclusive jurisdiction over such claims.

On March 31, 2000, the district court issued a memorandum opinion and order granting in part and denying in part petitioners' motion to dismiss. (App. 24-App. 41.) The district court dismissed respondent's claims against defendant County of Cook (App. 27), dismissed the state law claims against petitioners Kelly Jackson, Laura Loken, Timothy McPhillips, and Michelle Zimmerman, the four deputies who allegedly seized respondent Marcella Richman (App. 37, 41), dismissed respondents' claims for punitive damages under state law (App. 40, 41) and dismissed respondents' claim for punitive damages against Sheriff Sheahan in his official capacity (App. 40, 41). The district court denied the claims of quasi-judicial absolute immunity, sovereign immunity, Eleventh Amendment immunity and qualified immunity. Petitioners and Sheriff Sheahan appealed the denial of their claims of immunity.

On October 16, 2001, a divided panel of the Court of Appeals for the Seventh Circuit issued an opinion affirming in part and reversing in part the decision of the district court. *Richman v. Sheahan*, 270 F.3d 430 (7th Cir. 2001). (App. 1-App. 23.) The majority held that deputy sheriffs providing courtroom security are not entitled to quasi-judicial absolute immunity when they restrain a person pursuant to the direct order of a judge. *Richman*, 270 F.3d at 434-439. (App. 4-App. 12.) The majority also affirmed the denial of Sheriff Sheahan's claim of sovereign immunity. *Richman*, 270 F.3d at 439-440. (App. 12-App. 15.) With respect to respondent's state law tort claims, the majority reversed the decision of the district court denying petitioners' motion to dismiss counts V and

VI of the amended complaint and held that the Illinois Court of Claims had exclusive jurisdiction over these tort claims. (App. 15-App. 19.) The majority found that the deputy sheriffs acted as an arm of the State of Illinois when they executed Judge Jordan's order. Consequently, the majority held that the deputy sheriffs' acts were attributable to the State for purposes of sovereign immunity. *Richman*, 270 F.3d at 442. (App. 18.)

In dissent, Judge Bauer discussed the case of *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997). Like the instant case, *Martin v. Hendren* "involves police officers under the immediate direction and supervision of a judge, following the judge's orders to restore or maintain order in the court instanter, doing precisely what they are sworn to do." *Richman*, 270 F.3d at 443 (Bauer, J., dissenting). (App. 20.) Judge Bauer stated that he would follow the decision of the Eighth Circuit in *Martin v. Hendren* and "hold the bailiffs to be cloaked with immunity when carrying out the orders of the court relating to the conduct of court proceedings themselves." *Richman*, 270 F.3d at 444 (Bauer, J., dissenting). (App. 23.)

In connection with the conflict raised in the dissent, the majority noted that it had circulated its opinion to the full court before release in accordance with Seventh Circuit Rule 40(e). *Richman*, 270 F.3d at 439, n.5. (App. 12.) The court further noted that a "majority did not favor a rehearing *en banc* on the question of the deputies' entitlement to quasi-judicial immunity." *Id.* (App. 12.) Judge Bauer voted to grant rehearing *en banc*. *Id.* (App. 12.)

SUMMARY OF THE ARGUMENT

This case has national importance because of its impact on the maintenance of security and order in the courts of this nation. Courtrooms, particularly in this day and age, should be sacrosanct, and judges should be secure in the knowledge that courtroom bailiffs and security personnel will enforce their orders immediately and without pause. As the Eighth Circuit observed in *Martin v. Hendren*, "because judges frequently encounter disruptive individuals in their courtrooms, exposing bailiffs and other court security officers to potential liability for acting on a judge's courtroom orders could breed a dangerous, even fatal hesitation." *Martin v. Hendren*, 127 F.3d at 722; *see also Richman*, 270 F.3d at 444 (Bauer, J., dissenting). (App. 22.) Requiring courtroom security personnel to weigh each court order within the context of potential liability creates a breeding ground for such "fatal hesitation."

Bailiffs fearful of individual capacity lawsuits for carrying out direct orders to restrain, remove or arrest unruly or disruptive parties will understandably hesitate to act. It is imperative that the courts make clear to bailiffs and security personnel working in the courtroom that quasi-judicial immunity will protect them from civil damages and protracted litigation when obeying and enforcing direct orders of the court. Absolute immunity for bailiffs serves the important public interest[2] of ensuring

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[2] *See Pierson v. Ray*, 386 U.S. 547, 554 (1967) (noting that absolute judicial immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty

(continued...)

open, safe and secure courtrooms. As Justice Stevens of this Court has observed, "[f]reedom of access to the courts is a cherished value in our democratic society." *Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1070 (1985) (Stevens, J., concurring in dismissal for want of jurisdiction). In order for our justice system to function in this time of turmoil, courtrooms should be a bastion of peace where the business of a democracy can be carried out without fear.

In his dissent in *Richman*, Judge Bauer stated that he "would reverse the district court and hold the bailiffs to be cloaked with immunity when carrying out the orders of the court relating to the conduct of court proceedings themselves." *Richman*, 270 F.3d at 444 (Bauer, J., dissenting). (App. 23.) Prior to the Seventh Circuit's decision in *Richman*, the Eighth and Tenth Circuits recognized the importance of granting bailiffs such immunity. *See Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997); *Valdez v. City of Denver*, 878 F.2d 1285 (10th Cir. 1989). The majority in *Richman* acknowledged that it reached the opposite conclusion of the Eighth Circuit. *Richman*, 270 F.3d at 436. (App. 6-App. 7.)

If the decision in *Richman* is allowed to stand, bailiffs and security personnel will continue to engage in the inevitable second-guessing of court orders. More importantly, judges will be required to attempt to maintain order with the knowledge that their orders are being second-guessed. A bailiff's indecision could cause a "fatal

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(...continued)
to exercise their functions with independence and without fear of consequences" *quoting Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868)).

hesitation" at a time of need and, thus, undermine the functioning of a public court. The potential for such a breakdown in our judicial system is a poignant reminder of Justice Stevens' statement that open access to the courts is a cherished value that should not be diminished or lost.

The Court should grant this petition in order to resolve the very serious conflict among the circuits that *Richman* has created.

REASONS FOR GRANTING THE WRIT

The majority opinion in *Richman* held that courtroom bailiffs under the immediate and direct supervision of a judge are not entitled to quasi-judicial immunity from federal constitutional claims based upon the bailiffs' execution of a lawful judicial order in the courtroom while court was in session. The decisions of *Martin v. Hendren* and *Valdez* reach the opposite conclusion. *Richman*, therefore, creates a conflict with the Eighth and Tenth Circuits.

The *Richman* decision also applies the doctrine of quasi-judicial immunity in a manner that conflicts with *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286 (1991), as well as earlier decisions of this Court in *Bradley v. Fisher*, 80 U.S. 335, 13 Wall. 335 (1871), *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099 (1978) and *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538 (1988).

In accordance with the criteria set forth in Supreme Court Rule 10(a) and 10(c), the Court should grant this petition.

I. THE COURT SHOULD RESOLVE THE CONFLICT BETWEEN THREE CIRCUITS REGARDING THE ISSUE OF WHETHER BAILIFFS ARE ENTITLED TO QUASI-JUDICIAL ABSOLUTE IMMUNITY WHILE ENGAGED IN THE PROMPT ENFORCEMENT OF JUDICIAL ORDERS NECESSARY FOR THE PRESERVATION OF SAFETY AND SECURITY IN THE NATION'S COURTS.

As Judge Bauer observed, the instant case "is virtually on all fours" with *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997). *See Richman*, 270 F.3d at 443 (Bauer, J., dissenting). (App. 19.)

In *Martin*, the plaintiff's son appeared before a state court on a traffic charge. Without permission, the plaintiff Martin approached the bench. The judge twice told Martin to sit down. Martin, like Mr. Richman, ignored the court. The judge then ordered Officer Hendren to remove Martin from the courtroom. A struggle ensued in which Martin was struck. The judge held Martin in contempt and ordered Hendren to handcuff her. Hendren forced Martin face down on the floor and handcuffed her. The Eighth Circuit stated that a judge's absolute immunity extends to public officials for "acts they are specifically required to do under court order or at a judge's direction." *Martin v. Hendren*, 127 F.3d at 721 *citing Robinson v. Freeze*, 15 F.3d 107, 109 (8th Cir. 1994). The court then held that:

> Like other officials, bailiffs enjoy absolute quasi-judicial immunity for actions "specifically ordered by the trial judge and related to the judicial function." *Id.* In subduing Martin, Hendren was acting as a *de facto* bailiff, obeying specific judicial commands to restore order in the courtroom. Those orders unquestionably related to the judicial function. *See Mireles v. Waco*, 502 U.S. 9,

> 12-13, 116 L. Ed. 2d 9, 112 S. Ct. 286 (1991) (per curiam); *Terry v. State*, 303 Ark. 270, 796 S.W.2d 332, 335 (Ark. 1990). Hendren is thus entitled to absolute quasi-judicial immunity from Section 1983 liability for carrying out the judge's orders to handcuff Martin and remove her from the courtroom.

Id.

Martin also argued that Hendren ceased to act in a quasi-judicial capacity when he applied excessive force. The Eighth Circuit rejected this argument and observed that under the reasoning of *Mireles v. Waco*, 502 U.S. 9 (1991), it is the nature of the function being performed and not the particular act itself that controls the judicial immunity analysis. The Eighth Circuit observed that a grant of quasi-judicial immunity to bailiffs who enforced direct court orders would be "illusory" if it were lost the moment someone alleges that the bailiff acted improperly. *Martin v. Hendren*, 127 F.3d at 722. To ensure that it was not "an illusory concept," the Eighth Circuit concluded that Hendren was entitled to quasi-judicial absolute immunity for the enforcement of lawful judicial orders in the judge's courtroom and presence. *Id.* The Tenth Circuit reached the same conclusion in *Valdez v. City of Denver*, 878 F.2d 1285 (10th Cir. 1989).

Like the plaintiffs in *Richman* and *Martin v. Hendren*, the plaintiff in *Valdez* continued to exchange words with a state court judge hearing a traffic case while court was in session—and after being admonished to cease talking. After the admonition, the plaintiff Valdez exclaimed a profanity at the judge who then held Valdez in contempt and ordered him to await sentencing outside the courtroom. Valdez then filed federal constitutional claims

against the officers who detained him pursuant to the court's order.

Like the Eighth Circuit in *Martin v. Hendren*, the Tenth Circuit held that the officers were absolutely immune from suit and stated that:

> Enforcing a court order or judgment is intrinsically associated with a judicial proceeding. [citation omitted] If losing parties were free to challenge the will of the court by threatening its officers with harassing litigation, the officers might neglect the execution of their sworn duties. . . . Absolute immunity for officials assigned to carry out a judge's orders is necessary to insure that such officials can perform their function without the need to secure permanent legal counsel. A lesser degree of immunity could impair the judicial process.

Valdez, 878 F.2d at 1288. The Tenth Circuit explained the public policy underlying the grant of quasi-judicial absolute immunity to bailiffs enforcing orders in the judge's courtroom and presence:

> Tension between trial judges and those officials responsible for enforcing their orders inevitably would result were there not absolute immunity for both. [citation omitted] Officials employed to implement facially valid court orders could choose: They may disregard the judge's orders and face discharge, or worse yet criminal contempt, or they may fulfill their duty and risk being hauled into court. Judge Learned Hand recognized years ago that the fear of suit will "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching dis-

> charge of their duties." [citation omitted] Officials such as the defendants must not be required to act as pseudo-appellate courts scrutinizing the orders of judges. [citation omitted] The public interest demands strict adherence to judicial decrees. . . . [T]he public interest in the enforcement of court orders that is essential to the effective functioning of our judicial process far outweighs the benefit to be gained by providing the defendants . . . with only limited immunity.

Valdez, 878 F.2d at 1289. The Tenth Circuit also noted that the grant of absolute immunity does not give judges and their courtroom personnel unfettered discretion because "unscrupulous judges are not totally insulated from the public will. Even judges are subject to professional discipline, constitutional or statutory removal, or in more egregious cases, criminal prosecution . . . ." *Id.*

The majority in *Richman* reached an opposite result from the decisions of the Eighth Circuit in *Martin v. Hendren* and the Tenth Circuit in *Valdez*. Instead, the majority in *Richman* chose to follow another Tenth Circuit decision, *Martin v. Board of County Commissioners*, 909 F.2d 402 (10th Cir. 1990), a case in which the plaintiff sued two deputy sheriffs for using excessive force when they arrested her at a hospital. *See Richman*, 270 F.3d at 435-436. (App. 6.) *Martin v. Board of County Commissioners* is, however, inapposite to the instant case. As Judge Bauer observed in his dissent:

> The tenth circuit case [*Martin v. Board of County Commissioners*] involved police conduct in serving a bench warrant . . . . I have no quarrel with the result reached by the tenth circuit case; it differs not at all from the run-of-the-mill arrests

> made pursuant to any judicial warrant and, since the arrest takes place away from the courtroom and away from the watchful eye of the judicial officer who issued the warrant, the conduct of the police is more likely to require a closer scrutiny. Nor is the immediate service of the warrant necessary to provide the court with the proper decorum needed to continue the work of the court.

Richman, 270 F.3d at 443 (Bauer, J., dissenting). (App. 19-App. 20.) Indeed, the *Richman* majority failed to recognize the difference between the enforcement of judicial orders within the courtroom and the enforcement of orders outside of the courtroom and outside the presence of the judge. When bailiffs in the courtroom enforce a judge's direct orders, they do so under the judge's direct and immediate supervision. Consequently, if a judge witnesses a bailiff improperly enforcing his or her order, he or she can immediately order the bailiff to stop. The judge's immediate direction and supervision of courtroom security personnel is the crucial factual difference between *Martin v. Board of County Commissioners* and *Richman*, *Martin v. Hendren* and *Valdez*.

When it declined to follow *Martin v. Hendren* and *Valdez*, two cases directly on point, the Seventh Circuit created a significant conflict among the circuits regarding the nature of immunity afforded to bailiffs enforcing judicial orders in the courtroom and in the judge's presence. The Court should grant the writ to resolve this very serious conflict.

II. THE COURT SHOULD CORRECT THE MISAPPLICATION OF QUASI-JUDICIAL ABSOLUTE IMMUNITY APPLIED BY THE MAJORITY IN *RICHMAN* BECAUSE IT CONFLICTS WITH THIS COURT'S DECISION IN *MIRELES v. WACO* AND OTHER DECISIONS FROM THIS COURT CONSTRUING ABSOLUTE JUDICIAL IMMUNITY.

"The contempt power lies at the core of the administration of a State's judicial system." *Juidice v. Vail*, 430 U.S. 327, 335, 97 S. Ct. 1211 (1977). Courtroom security cannot be maintained unless judges can direct a member of the executive branch to enforce contempt orders and orders to arrest or restrain unruly individuals in court. Under the approach of the majority in *Richman*, judges have absolute immunity for the orders they give, but bailiffs who enforce such orders in court in the judge's presence only have qualified immunity. In this regard, the majority acknowledges the problem but stops short of providing a workable solution:

> A secure courtroom is necessary to protect the judicial function from interference or intimidation; this function is adequately protected by immunizing a judge's order to restrain a person, *see Mireles*, 502 U.S. at 12-13, and by barring lawsuits that challenge a judge's decision through claims at officers who do nothing more than implement it. [citation omitted] It is not necessary to the judicial function, in our judgment, to also deny a remedy to plaintiffs who were harmed not by the judge's order, but by unlawful conduct by those who enforce it.

Richman, 270 F.3d at 438-439. (App. 11-App. 12.) At the end of the day, a person unhappy because a judge ordered his removal from a courtroom, but mindful of the

parsing in *Richman*, can sidestep the purported judicial immunity by alleging a wrongful execution of the order—thus dragging the judge's order and ostensible absolute immunity into a mire of collateral litigation.

This Court has recognized that "judicial immunity apparently originated, in medieval times, as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error." *Forrester v. White*, 484 U.S. 219, 225, 108 S. Ct. 538, 543 (1988). The central analytical problem with the majority opinion in *Richman* is its cramped view of judicial immunity.

This Court has long held that judicial immunity can be overcome in only two ways. First, a judge is not immune from liability for nonjudicial conduct, such as actions performed in an administrative capacity. *Forrester*, 484 U.S. at 227-229; *Stump v. Sparkman*, 435 U.S. 349, 360, 98 S. Ct. 1099 (1978). Second, a judge is not immune "for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 12, 112 S. Ct. 286 (1991); *see also Stump*, 435 U.S. at 356-357; *Bradley v. Fisher*, 80 U.S. 335, 13 Wall. 335, 351 (1871).

Consequently, the question of a judge's immunity does not turn on whether or not the judge engaged in willful or malicious conduct. A long line of precedent from this Court demonstrates that this question turns instead on whether the judge engaged in non-judicial conduct or acted in the complete absence of all jurisdiction. With respect to bailiffs enforcing judicial orders in the courtroom—court personnel whose immunity must mirror the immunity afforded to judges—the majority in *Richman* abandons this approach and replaces it with an analysis of whether bailiffs wrongfully executed the judge's order

in his presence. To be sure, a plaintiff could not evade the application of absolute judicial immunity simply by alleging that the judge acted maliciously or wrongfully. Yet, that is exactly the approach that the majority in *Richman* embraces with respect to courtroom security performing the quasi-judicial function of enforcing judicial orders in a courtroom in the presence of a judge.[3]

Thus, under *Richman*, a plaintiff could not sue a bailiff for enforcing a judge's order in the courtroom but could sue for the alleged wrongful execution of such an order. The limited hybrid form of absolute immunity that the *Richman* majority would give to courtroom security personnel is nothing more than an "illusory" promise.

In addition to misapplying this Court's precedents regarding the application of judicial immunity, *Richman* also conflicts with *Mireles*.[4] In *Mireles*, the plaintiff

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[3] The same considerations which support the application of a functional approach to the grant of absolute immunity to judges has also been applied to prosecutors when functioning as an advocate for the state. *See Imbler v. Pachtman*, 424 U.S. 409, 422-423, 96 S. Ct. 984 (1976) (stating that the common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges acting within the scope of their duties).

[4] In his dissent in *Mireles*, Justice Scalia stated that the fact pattern of *Mireles* was "so extraordinary that it [did] not warrant the expenditure of [the Court's] time." *Mireles*, 502 U.S. at 15 (Scalia, J., dissenting). Petitioners submit, however, that disturbances are not unique or isolated phenomena in "grass roots" courts. Bailiffs are often called on to quell outbursts in court. *Martin v. Hendren*, *Valdez* and *Richman* are three examples of cases where a disturbance occurred in traffic court and a judge ordered courtroom security personnel to

(continued...)

alleged that a judge ordered several police officers "to forcibly and with excessive force seize and bring plaintiff into his courtroom." *Mireles*, 502 U.S. at 10. This Court held that the judge was absolutely immune from suit because the order to seize plaintiff with excessive force was a judicial act and was not taken in the absence of jurisdiction. *Id.* at 12-13. As this Court observed, "the relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself.'" *Id.* at 13.

Under this functional approach, petitioners clearly performed a quasi-judicial function when they enforced Judge Jordan's order to take Mr. Richman into custody for his repeated failures to heed the judge's requests to refrain from interrupting the court. If the judge in *Mireles* had absolute judicial immunity from suit based upon an alleged order to use "excessive force" against the plaintiff, then petitioners should have absolute quasi-judicial immunity for executing, in Judge Jordan's presence, his lawful order to restrain and arrest Mr. Richman. The application of a functional approach preserves

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(...continued)
restrain and arrest the person causing the disturbance. A fourth example is the recent district court case of *Rodgers v. County of Ionia*, 2001 U.S. LEXIS 4445 (W.D. Mich. March 26, 2001). In dismissing a lawsuit that a disgruntled litigant filed against a court bailiff over an altercation in traffic court, the district court followed *Martin v. Hendren* and stated that "[t]he rationale for extending absolute judicial immunity to a bailiff carrying out court orders is obvious. Otherwise, personnel carrying out judicial orders would become 'lightning rods' for lawsuits and the purpose of judicial immunity (the creation of a sphere of safety in which judicial decisions can be free from reprisals from unhappy litigants) would be quickly defeated." *Rodgers*, 2001 U.S. Dist. LEXIS 4445 at *11.

the grant of absolute immunity that is vital to our judicial system. Anything less would serve to foster claims brought against courtroom security personnel and to weaken the authority of the judge within his or her courtroom.

Because the majority decision in *Richman* conflicts with *Mireles* and earlier decisions construing absolute judicial immunity, this Court should grant the writ.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-2173

MARCELLA RICHMAN, Individually and
as Special Administrator of the Estate
of Jack B. Richman, deceased,

Plaintiff-Appellee,

v.

MICHAEL SHEAHAN, in his Official Capacity
as Sheriff of Cook County, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 7350—**Joan B. Gottschall**, *Judge.*

ARGUED DECEMBER 6, 2000—DECIDED OCTOBER 16, 2001

Before BAUER, POSNER, and WILLIAMS, *Circuit Judges.*

WILLIAMS, *Circuit Judge.* Jack Richman died shortly after fourteen sheriff's deputies restrained him during his mother's appearance before an Illinois judge on a traffic violation. Marcella Richman, on her own behalf and on behalf of her son's estate, brought federal and state claims against the sheriff's deputies in their individual capacities and against Cook County Sheriff Michael Sheahan in his official capacity. The defendants filed a motion to dismiss based in part on absolute, Eleventh Amendment, and state sovereign immunity. We agree with the district court that

the deputies are not entitled to absolute immunity, and therefore affirm the court's denial of their motion to dismiss the § 1983 claims. Because we cannot conclude as a matter of law that the sheriff's alleged unconstitutional policy regarding training and supervision of deputies represents state policy for purposes of Eleventh Amendment immunity, we affirm the district court's denial of the sheriff's motion to dismiss. However, we conclude that the deputies' conduct would be attributed to the state for purposes of Illinois sovereign immunity, and therefore reverse the district court's denial of the deputies' motion to dismiss the state law claims.

I. BACKGROUND

Marcella Richman appeared in the Circuit Court of Cook County, Illinois, to challenge a traffic citation.[1] She was accompanied by her son, Jack Richman, who planned to testify as a witness. The Richmans waited in the courtroom for several hours before their case was called, and then the judge continued the hearing to a future date. The Richmans attempted to ask a question but the judge quieted them, and when Jack continued to speak, the judge ordered him restrained. Two Cook County sheriff's deputies began to take him into custody and twelve more deputies then entered the courtroom. According to the complaint, the fourteen deputies attacked Jack, forced him to the floor, sat on and handcuffed him. Jack, who was physically disabled and required the use of a cane, did not resist the deputies' attempt to restrain him, nor did his mother, who was restrained by four other deputies. While Jack was hand-

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[1] This version of events is from the allegations of Richman's amended complaint, which we accept as true for purposes of reviewing the defendants' motion to dismiss. *See Hammond v. Kunard*, 148 F.3d 692, 695 (7th Cir. 1998).

cuffed and on the floor, he emptied his bladder and bowels, and he appeared to have stopped breathing. Paramedics rendered emergency assistance at the scene and then transported him to a hospital, where he was pronounced dead.

Marcella Richman's amended complaint seeks damages against the deputies in their individual capacities pursuant to 42 U.S.C. § 1983, alleging that the deputies' conduct violated her and her son's right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments. The complaint also includes § 1983 claims against Cook County Sheriff Michael Sheahan in his official capacity, alleging that he failed adequately to train and supervise the deputies in their duties "to refrain from using excessive force in effecting seizures of citizens." The complaint also includes claims against the deputies under the Illinois Wrongful Death Act, 740 Ill. Comp. Stat. 180/1, and the Survival Act, 755 Ill. Comp. Stat. 5/27-6.[2]

II. ANALYSIS

On appeal, we must decide whether the district court erred in denying the defendants' motion to dismiss based on (1) the deputies' claim to absolute immunity; (2) the sheriff's claimed right, under the Eleventh Amendment, to be free from suit in federal court; and (3) the deputies' claim to sovereign immunity under the Illinois State Lawsuit Immunity Act, 745 Ill. Comp. Stat. 5/1, and Court of Claims Act, 705 Ill. Comp. Stat. 505/8. We review each of these questions of law de novo. *DeGenova v. Sheriff of DuPage County*, 209 F.3d 973, 975 (7th Cir. 2000); *Hammond v. Kunard*, 148 F.3d 692, 695 (7th Cir. 1998); *cf. Benning v. Bd. of Regents*, 928 F.2d 775, 778-80 (7th Cir. 1991).

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[2] Other defendants and claims were dismissed below and are not involved in this appeal.

A. Absolute Immunity—§ 1983 Claims Against the Deputies

The parties are correct that we have jurisdiction, under the collateral order doctrine, to review the district court's decision to deny the defendants' motion to dismiss based on absolute immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1995); *Hammond*, 148 F.3d at 695.

The ordinary rule is that qualified—and not absolute—immunity is sufficient to protect law enforcement officers in the conduct of their official duties. *Malley v. Briggs*, 475 U.S. 335, 340-41 (1986); *Pierson v. Ray*, 386 U.S. 547, 557 (1967). The deputies argue that the ordinary rule does not apply in this case because they were required to execute the judge's order, and that quasi-judicial immunity, a form of absolute immunity derived from judicial immunity, is appropriate for officers providing courtroom security. We disagree.

We begin our analysis with the fundamental principle that judges are entitled to absolute immunity from damages for their judicial conduct. *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991); *Forrester v. White*, 484 U.S. 219, 225-29 (1988). Judicial immunity was recognized at common law "as a device for discouraging collateral attacks and thereby helping to establish appellate procedures as the standard system for correcting judicial error" and to "protect[ ] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants." *Forrester*, 484 U.S. at 225; *see also Pierson*, 386 U.S. at 554; *Bradley v. Fisher*, 80 U.S. 335, 347 (1872).

The absolute immunity afforded to judges has been extended to apply to "quasi-judicial conduct" of "[n]on-judicial officials whose official duties have an integral relationship with the judicial process." *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1238 (7th Cir. 1986). For example, we have applied absolute immunity to officials engaged in quasi-

judicial decision making, such as members of a parole board. *See Wilson v. Kelkhoff*, 86 F.3d 1438, 1443-44 (7th Cir. 1996); *Walrath v. United States*, 35 F.3d 277, 281-82 (7th Cir. 1994). For these officers, whose conduct is "functionally comparable" to those of judges, *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993); *Wilson*, 86 F.3d at 1443, the rationale for applying absolute immunity is much the same as for judges: that officials making quasi-judicial decisions should be free of "'the harassment and intimidation associated with litigation.'" *See Kincaid v. Vail*, 969 F.2d 594, 600-01 (7th Cir. 1992) (quoting *Burns v. Reed*, 500 U.S. 478, 494 (1991)). The deputies do not claim that they exercise a comparable form of discretionary decision making.[3]

The deputies instead rely on a different sort of quasi-judicial immunity, which we have recognized for some officials whose functions are further removed from the core dispute resolution function of judges. "[W]hen functions that are more administrative in character have been undertaken pursuant to the explicit direction of a judicial officer, we have held that that officer's immunity is also available to the subordinate." *Kincaid*, 969 F.2d at 601. The policy justifying an extension of absolute immunity in these circumstances is to prevent court personnel and other officials from becoming a "'lightning rod for harassing litigation' aimed at the court." *See Ashbrook v. Hoffman*, 617 F.2d 474, 476 (7th Cir. 1980) (quoting *Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976)); *see*

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[3] The deputies characterize their conduct as "classically ministerial," that is, without the exercise of their own discretion. *See* Black's Law Dictionary 1011 (7th ed. 1999). At common law, such conduct by a sheriff was not entitled to absolute immunity. *See* Thomas M. Cooley, Law of Torts, 376, 392-98 (Chicago, Callaghan 1880); *see also* Floyd R. Mechem, Public Offices and Officers, §§ 636-38 (Chicago, Callaghan 1890).

also Kincaid, 969 F.2d at 601; *Mays v. Sudderth*, 97 F.3d 107, 113 (5th Cir. 1996); *Coverdell v. Dept. of Social & Heath Servs.*, 834 F.2d 758, 765 (9th Cir. 1987).

We have not yet had occasion to consider whether law enforcement officers charged with using unreasonable force when seizing a person pursuant to a judge's order are entitled to quasi-judicial immunity. Two other circuit courts of appeal have addressed this question, with different results. In *Martin v. Board of County Commissioners*, 909 F.2d 402, 405 (10th Cir. 1990), the Tenth Circuit held that officers charged with employing excessive force to execute a bench warrant were not entitled to absolute immunity. The Tenth Circuit reasoned that, because an order to take someone into custody carries with it an implicit order not to use unreasonable force, the judge's order would not shield the officers from a claim challenging the manner in which they enforced the order. *Id.* The court distinguished its earlier holding in *Valdez v. City of Denver*, 878 F.2d 1285 (10th Cir. 1989), that law enforcement officers enforcing a contempt order were entitled to quasi-judicial immunity for claims of false arrest and imprisonment. In *Valdez*, the claim was not directed at the manner in which the judge's order was executed, but instead at conduct expressly prescribed by the order. Because of this difference, the court held that the policies underlying the extension of absolute immunity—not holding officials accountable for conduct they are powerless to avoid—did not apply. *Martin*, 909 F.2d at 404-05.

The Eighth Circuit reached the opposite conclusion in *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997), a case, like this one, in which the plaintiff was restrained in the courtroom by order of the judge. The Eighth Circuit rejected the Tenth Circuit's reasoning, and held that the alleged impropriety of the officers' acts (using excessive force to effectuate the seizure) did not strip the acts of their quasi-judicial character. *Id.* at 721-22. The Eighth Circuit relied on the Supreme Court's statement in *Mireles* that "'[i]f

judicial immunity means anything, it means that a judge will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority.'" 127 F.3d at 722 (quoting *Mireles*, 502 U.S. at 12-13).

We believe that the Eighth Circuit stretches the reasoning in *Mireles* too far, and confuses the question suggested by the Tenth Circuit in *Martin*—whether the challenged conduct was specifically ordered by the judge—with the separate question of whether the conduct was lawful or exceeded the actor's authority. In *Mireles*, the plaintiff challenged the judge's order directly—that is, by suing the judge. *Mireles* holds that when the challenged conduct is the judge's own decision making, the applicability of absolute immunity cannot turn on the correctness of the judge's decision. 502 U.S. at 12-13. By contrast, when the conduct directly challenged is not the judge's decision making, but the manner in which that decision is enforced, we agree with the Tenth Circuit that the law enforcement officer's fidelity to the specific orders of the judge marks the boundary for labeling the act "quasi-judicial." *See Martin*, 909 F.2d at 404-05.

More important, as Judge Lay points out in his dissent in *Hendren*, *Mireles* "directs that the facts of the incident must be evaluated in relation to the general function of the officer." *Hendren*, 127 F.3d at 723 (Lay, J., dissenting). In making this evaluation, "we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester*, 484 U.S. at 224.

Our quasi-judicial immunity cases demonstrate that the primary function to be protected is judicial or quasi-judicial decision making. This is true of cases challenging discretionary conduct by a quasi-judicial body like a parole board,

see Wilson, 86 F.3d at 1443-44, and it is also true when the lawsuit is aimed at persons integral to the judicial process but whose conduct is not "functionally comparable" to a judge's. *See Antoine*, 508 U.S. at 436; *Wilson*, 86 F.3d at 1443. For example, we have recognized absolute immunity for law enforcement officials when the challenged conduct (the mere act of enforcing a foreclosure judgment) was specifically ordered by the judge. *See Henry*, 808 F.2d at 1238-39. The source of the plaintiff's wrong in *Henry* was the judge's order itself, and we reasoned that a suit against the officers was not the appropriate vehicle for challenging the validity of that order. *See id.* Under those circumstances, extension of absolute immunity is not primarily to protect the enforcement function performed by the deputies, but rather to protect the judicial decision-making function by discouraging collateral attacks and encouraging appeals. *See id.* at 1239. It further avoids the "untenable result" of requiring "sheriffs and other court officers who enforce properly entered judgments pursuant to facially valid court orders to act as appellate courts, reviewing the validity of both the enforcement orders and the underlying judgments before proceeding to collect on them." *Id.*; *see also Mays*, 97 F.3d at 113; *Valdez*, 878 F.2d at 1289.

Similarly, for court personnel and adjuncts who do not exercise a discretionary function comparable to a judge's, the justification for extending absolute immunity is most compelling when the lawsuit challenges conduct specifically directed by the judge, and not simply the manner in which the judge's directive was carried out. *See Kincaid*, 969 F.2d at 601 (clerk who refused to accept filing of complaint at the direction of the judge was entitled to quasi-judicial immunity); *Dellenbach v. Letsinger*, 889 F.2d 755, 763 (7th Cir. 1989) (court reporter and clerks who told plaintiff to pay for unnecessary transcript at the request of the judge were entitled to quasi-judicial immunity); *Eades v. Sterlinske*, 810 F.2d 723, 726 (7th Cir. 1987) (clerk and court reporter

who prepared and filed a false certificate summarizing an instruction conference at the direction of the judge were entitled to quasi-judicial immunity); *cf. Lowe v. Letsigner*, 772 F.2d 308, 313 (7th Cir. 1985) (court clerk who allegedly concealed entry of order was not entitled to absolute immunity for his ministerial act of failing to type and send notice after entry of judgment).[4] By contrast, the Supreme Court has held that a court reporter was not entitled to absolute immunity for her own misconduct (losing her trial notes and failing to provide a transcript of the trial), reasoning that "court reporters do not exercise the kind of judgment that is protected by the doctrine of judicial immunity." *See Antoine*, 508 U.S. at 437.

The policies articulated in our quasi-judicial immunity cases have less force when, as in this case, the challenged conduct is the manner in which the judge's order is car-

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[4] The quasi-judicial immunity cases from other circuits cited by the deputies similarly involved challenges to conduct prescribed by the court's order or direction. *See Gallas v. Supreme Court of Pennsylvania*, 211 F.3d 760, 772-73 (3d Cir. 2000) (court administrator entitled to immunity for damages for release of information ordered by a judge); *Mays*, 97 F.3d at 108, 114 (official entitled to quasi-judicial immunity for "strict compliance" with facially valid order, but not for conduct that exceeded the scope of the order); *Roland v. Phillips*, 19 F.3d 552, 556-57 (11th Cir. 1994) (sheriffs entitled to quasi-judicial immunity for executing a facially valid court order); *Coverdell*, 834 F.2d at 764-65 (child protective services worker entitled to quasi-judicial immunity for executing order to apprehend a child); *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994) (court official entitled to quasi-judicial immunity for carrying out the order of the judge); *Robinson v. Freeze*, 15 F.3d 107, 109 (8th Cir. 1994) (holding that officers would be entitled to absolute immunity only for conduct "specifically ordered by the trial judge and related to the judicial function"); *Valdez*, 878 F.2d at 1289-90 (officers entitled to quasi-judicial immunity for enforcing contempt order).

ried out, and not conduct specifically directed by a judge. Reading Richman's complaint in the light most favorable to her, the claim is not that the judge ordered the deputies to use unreasonable force, but that the deputies exceeded the judge's order by the manner in which they executed it. The claim for damages in this case is not therefore a collateral attack on the judge's order (an order that Richman concedes was valid), and an appeal of the judge's order would provide no remedy. Similarly, the deputies are not being called upon to answer for wrongdoing directed by the judge, but instead for their own conduct. And that conduct—the manner in which they enforced the judge's order—implicates an executive, not judicial, function.

Moreover, we believe that the policies articulated by the Eighth Circuit in *Hendren* are insufficient to justify the extension of absolute immunity urged here. The Eighth Circuit expressed alarm at the possibility that exposing court security officers to "potential liability for acting on a judge's courtroom orders could breed a dangerous, even fatal, hesitation." *See Hendren*, 127 F.3d at 722. But without in any way minimizing the vital and often valorous service of those who provide security to judges and other participants in the judicial process, we note that the need for immediate action in the face of potentially fatal consequences is not a situation unique to courtrooms, and yet qualified immunity (which takes into account the particular circumstances faced by the officers) is the rule for law enforcement officers of all kinds, *see Malley*, 475 U.S. at 340-41; *Pierson*, 386 U.S. at 557, including secret service officers charged with guarding the President. *See Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam). That the conduct occurs in the courtroom, does not, in our opinion, justify our applying a different rule. In this regard, the Supreme Court has cautioned against our being overly solicitous of claims of immunity involving the judicial function:

> One can reasonably wonder whether judges, who have been primarily responsible for developing the law of official immunities, are not inevitably more sensitive to the ill effects that vexatious lawsuits can have on the judicial function than they are to similar dangers in other contexts. . . . Although Congress has not undertaken to cut back the judicial immunities recognized by this Court, we should be at least as cautious in extending those immunities as we have been when dealing with officials whose peculiar problems we know less well than our own.

Forrester, 484 U.S. at 226 (citation omitted).

Finally, the only difference (in terms of liability for damages) between the absolute immunity urged by the deputies here and the qualified immunity that is the ordinary rule for law enforcement officers is that the former shields even knowingly unlawful or plainly incompetent acts. *See Malley*, 475 U.S. at 341. Absolute immunity provides an additional benefit even for officers whose actions are reasonable because it allows them to avoid altogether the litigation that would be required in order to determine their entitlement to qualified immunity. The tradeoff, however, is that even victims of knowingly unlawful acts go without a remedy, and for that reason absolute immunity is applied with caution and only when it is necessary to protect the function at issue. *See Forrester*, 484 U.S. at 230; *Antoine*, 508 U.S. at 432 n.4; *Burns v. Reed*, 500 U.S. 478, 486-87 (1991). A secure courtroom is necessary to protect the judicial function from interference or intimidation; this function is adequately protected by immunizing a judge's order to restrain a person, *see Mireles*, 502 U.S. at 12-13, and by barring lawsuits that challenge a judge's decision through claims aimed at officers who do nothing more than implement it. *See Henry*, 808 F.2d at 1238-39. It is not necessary to the judicial function, in our judgment, to also deny a remedy

to plaintiffs who were harmed not by the judge's order, but by unlawful conduct by those who enforce it. We therefore affirm the district court's denial of the deputies' motion to dismiss the plaintiff's § 1983 claims.[5]

B. The Eleventh Amendment—§ 1983 Claims Against the Sheriff

Sheriff Sheahan claims that the district court erred in denying his motion to dismiss, in which he asserted that the Eleventh Amendment barred the plaintiff's § 1983 claim alleging that he failed adequately to train and supervise the deputies. We have jurisdiction, under the collateral order doctrine, to review the district court's denial of the sheriff's claim to Eleventh Amendment immunity. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146-47 (1993); *DeGenova*, 209 F.3d at 975; *Franklin v. Zaruba*, 150 F.3d 682, 684 (7th Cir. 1998). Because we cannot conclude as a matter of law that the alleged unconstitutional policy of the sheriff's office represents state policy, we affirm the district court's denial of the sheriff's motion to dismiss.

Richman sued Sheahan in his official capacity, and therefore the claim is against the entity of which he is an agent. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985); *Scott v. O'Grady*, 975 F.2d 366, 369 (7th Cir. 1992). The Eleventh Amendment does not apply to suits against counties or other local government entities. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Scott*, 975 F.2d at 370. Under Illinois law, sheriffs are classified as

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[5] This opinion has been circulated to the full court before release in accordance with Circuit Rule 40(e). A majority did not favor a rehearing en banc on the question of the deputies' entitlement to quasi-judicial immunity. Judge Bauer voted to grant rehearing en banc.

county, not state, officials, and when the sheriff "performs his duties as the principal executive officer or chief law enforcement officer of the county, he acts as a county official" and the Eleventh Amendment does not apply. *Scott*, 975 F.2d at 371; *Franklin*, 150 F.3d at 684; *Ruehman v. Sheahan*, 34 F.3d 525, 528 (7th Cir. 1994). However, a county sheriff may act as an arm of the state when performing certain functions. *Ruehman*, 34 F.3d at 528; *Scott*, 975 F.2d at 371. When he does so, a suit challenging that conduct is against the state, and the claim for damages may not be brought in federal court. *Ruehman*, 34 F.3d at 528; *Scott*, 975 F.2d at 371.

In determining whether the sheriff is an agent of Illinois government when performing particular functions, we have looked to the degree of control exercised by Illinois over the conduct at issue and whether the Eleventh Amendment policy of avoiding interference with state (as opposed to county) policy is offended by the lawsuit. *See Ruehman*, 34 F.3d at 529; *Scott*, 975 F.2d at 371. In *Scott*, for example, deputy sheriffs were sued in their official capacities for executing a writ of assistance issued by an Illinois court. We noted that because the sheriff had "a statutory, nondiscretionary duty to execute this writ," the deputies were acting as state, not county, officers. *Scott*, 975 F.2d at 371.

But not all actions associated with carrying out the deputies' duty to execute the state court's orders are actions on behalf of the state. For example, in *Ruehman*, the plaintiff challenged the sheriff's design of a system to track warrants issued by state courts. We noted, consistent with *Scott*, that an official-capacity suit challenging the deputies' execution of the warrants would be a suit against the state because the warrants were issued by the Illinois courts. 34 F.3d at 528-29. However, the warrant-tracking system that was at the heart of the plaintiff's complaint was designed and implemented by the sheriff and county government, and did not therefore implicate state policy: "State law re-

quires the Sheriff to arrest the right people but says nothing about how he should do it." *Id.* at 529.

As in *Ruehman*, the claim against the sheriff in this case does not challenge the mere execution of the court's order by the sheriff's office. Nor does it seek to hold the sheriff liable as the deputies' employer, a theory that is foreclosed by *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 692 (1978). Instead, Richman's claim against the sheriff's office is based on its alleged unconstitutional policy (its failure adequately to train and supervise the deputies in deliberate indifference to the plaintiff's rights) regarding the use of force when arresting persons in the courtroom pursuant to a judge's order. Therefore, we must determine whether that alleged policy represents state policy or instead county policy. *See McMillian v. Monroe County, Alabama*, 520 U.S. 781, 784 (1997); *DeGenova*, 209 F.3d at 975-76; *Ruehman*, 34 F.3d at 529. Sheriff Sheahan does not contend that Illinois has any policy regarding, or exercises any control over, his training or supervision of deputies in the use of force when executing court orders. *Cf. Ruehman*, 34 F.3d at 529; *DeGenova*, 209 F.3d at 976. Instead, the sheriff relies on an Illinois statute that requires the sheriff to obey orders of Illinois courts:

> Each sheriff shall, in person or by deputy, county corrections officer, or court security officer, attend upon all courts held in his or her county when in session, and obey the lawful orders and directions of the court, and shall maintain the security of the courthouse.

55 Ill. Comp. Stat. 5/3-6023.

We are unable to conclude from this provision that the county sheriff operates as a state officer with respect to the conduct alleged here. Aside from the explicit command that sheriffs obey orders of Illinois courts, Illinois law assigns the responsibility for courtroom security generally to the

county sheriff. *Id.* The sheriff has no discretion in whether to obey a judge's orders, but we are aware of no state policy directing the sheriff's actions regarding the training and supervision of deputies in the use of force in carrying out state court orders. The evidence may show otherwise, but at this stage of the proceedings, we cannot conclude as a matter of law that the alleged unconstitutional policy represents state policy. Therefore, we affirm the district court's denial of Sheriff Sheahan's motion to dismiss.[6]

C. Sovereign Immunity—State Law Claims Against the Deputies

The deputies moved to dismiss the state wrongful death and survival claims, asserting that they were entitled to sovereign immunity under the Illinois State Lawsuit Immunity Act, 745 Ill. Comp. Stat. 5/1, and Court of Claims Act, 705 Ill. Comp. Stat. 505/8. The district court denied the deputies' motion, holding that the lawsuit was not a suit against the state for purposes of Illinois sovereign immunity. On appeal, the deputies argue that the district court's decision was wrong as a matter of Illinois law. We agree.

The Illinois State Lawsuit Immunity Act, 745 Ill. Comp. Stat. 5/1, provides that the State of Illinois is immune from

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[6] Sheriff Sheahan's claim to absolute immunity is without merit because the suit is against him in his official capacity. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 166 (1993). Also without merit is his claim that he cannot be liable if the deputies are immune. The sheriff relies on *Tesch v. County of Green Lake*, 157 F.3d 465, 477 (7th Cir. 1998), which held that without an underlying constitutional violation, there can be no liability on a failure to train theory. *Id.* However, if there is a constitutional violation (a question we do not address here), an officer's immunity from damages does not negate the existence of that violation.

suit in any court, except as provided in the Illinois Court of Claims Act, 705 Ill. Comp. Stat. 505/8 (and other statutes not relevant here), which vests jurisdiction over state tort claims against the state in the Illinois Court of Claims. These state immunity rules apply to Richman's state law claims in federal court. *Benning v. Bd. of Regents*, 928 F.2d 775, 778-79 (7th Cir. 1991); *Magdziak v. Byrd*, 96 F.3d 1045, 1048 (7th Cir. 1996).

Under Illinois law, a claim against individual officers will be considered a claim against the state, even when, as here, the officials are sued in their individual capacities, if "judgment for the plaintiff could operate to control the actions of the State or subject it to liability." *Currie v. Lao*, 592 N.E.2d 977, 980 (Ill. 1992); *Feldman v. Ho*, 171 F.3d 494, 498 (7th Cir. 1999). If the state law claim is deemed to be against the state, then it must be dismissed. This is because, under Illinois law, the deputies would have absolute immunity, and under the Eleventh Amendment, the claim for damages against the state may not be brought in federal court. *Feldman*, 171 F.3d at 498. Either way, the collateral order doctrine provides the basis for appellate jurisdiction under the principles of *Mitchell*, 472 U.S. at 525-30, and *Metcalf & Eddy*, 506 U.S. at 145-46. *See Griesel v. Hamlin*, 963 F.2d 338, 340-41 (11th Cir. 1992) (per curiam) (holding that denial of officer's immunity under state law is an immediately appealable collateral order); *Napolitano v. Flynn*, 949 F.2d 617, 621 (2d Cir. 1991) (same).

Deputy sheriffs executing orders of the court may be agents of the state for purposes of Illinois sovereign immunity. *Alencastro v. Sheahan*, 698 N.E.2d 1095, 1101 (Ill. App. Ct. 1998). An agent's conduct will be attributed to the state for purposes of sovereign immunity if: " '(1) [there are] no allegations that an agent or employee of the State acted beyond the scope of his authority through wrongful acts; (2) the duty alleged to have been breached was not owed to the public generally independent of the fact of State employ-

ment; and (3) . . . the complained-of actions involve matters ordinarily within that employee's normal and official functions of the State.'" *Healy v. Vaupel*, 549 N.E.2d 1240, 1247 (Ill. 1990) (quoting *Robb v. Sutton*, 498 N.E.2d 267, 272 (Ill. App. Ct. 1986)); *Benning*, 928 F.2d at 779. "Sovereign immunity affords no protection, however, when it is alleged that the State's agent acted in violation of statutory or constitutional law or in excess of his authority." *See Nichol v. Stass*, 735 N.E.2d 582, 586 (Ill. 2000); *Healy*, 549 N.E.2d at 1247; *see also Feldman*, 171 F.3d at 498 ("Illinois follows the federal practice by making an exception for situations in which the public employee did not act within the scope of his employment or violated the Constitution.").

Applying these principles, we conclude that Illinois would consider the wrongful death and survival claims against the deputies to be against the state. Richman's state wrongful death and survival claims are not dependant on the alleged constitutional violation, but instead on a theory of wilful and wanton negligence, so the exception to immunity for unconstitutional conduct does not apply. *Cf. Medina v. City of Chicago*, 606 N.E.2d 490, 498 (Ill. App. Ct. 1992) (holding that there was no inconsistency between jury's verdict for plaintiff on wrongful death claim and for defendant on § 1983 claim of excessive force: "Two different standards are involved."); *Leavitt v. Farwell Tower Ltd. P'ship*, 625 N.E.2d 48, 52 (Ill. App. Ct. 1993) (wrongful death claim requires a breach of a duty, owed to the decedent, which proximately caused decedent's death, and pecuniary damages). Furthermore, Richman does not allege that the deputies' conduct was not within their normal duties, and the duty owed to Jack Richman was owed by virtue of the deputies' obligation to enforce the state court's order. The critical question, then, for determining the deputies' entitlement to sovereign immunity is whether the deputies acted beyond the scope of their authority. *See Healy*, 549 N.E.2d at 1247; *Benning*, 928 F.2d at 780-81.

As we noted earlier in this opinion (for purposes of determining the deputies' entitlement to quasi-judicial immunity), Richman does not allege that the deputies' conduct was specifically authorized by the Illinois judge. However, for purposes of determining whether an agent's acts are within the scope of his authority, the fact that the agent's act was not specifically authorized is not dispositive, so long as it is of the general kind he is authorized to perform, and is motivated, at least in part, by a purpose to serve the principal.[7] *See Janes v. Albergo*, 626 N.E.2d 1127, 1132-33 (Ill. App. Ct. 1993); *Gaffney v. City of Chicago*, 706 N.E.2d 914, 919-20 (Ill. App. Ct. 1998); *Mitchell v. Norman James Constr. Co.*, 684 N.E.2d 872, 878 (Ill. App. Ct. 1997); *Sunseri v. Puccia*, 422 N.E.2d 925, 930 (Ill. App. Ct. 1981). Similarly, if there are no allegations that the defendant was acting for a purpose unrelated to his employment, the fact that the conduct was wilful and wanton does not take the conduct outside the defendant's scope of agency for purposes of sovereign immunity. *See Janes*, 626 N.E.2d at 1132; *Rembis v. Bd. of Trustees*, 618 N.E.2d 797, 799-800 (Ill. App. Ct. 1993); *Campbell v. White*, 566 N.E.2d 47, 53-54 (Ill. App. Ct. 1991). Richman alleges that the deputies' conduct was wilful and wanton, but there is nothing in the complaint that would indicate that the deputies' conduct was motivated by a purpose other than executing the judge's order. We therefore conclude that the deputies' actions were within the scope of their authority for purposes of Illinois sovereign immunity.

Because we conclude that the deputies' acts are attributable to the state for purposes of sovereign immunity under the Illinois State Lawsuit Immunity Act and Court

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[7] On this question we are guided by Illinois law of sovereign immunity, which involves different considerations than the principles underlying the extension of quasi-judicial immunity to law enforcement officers on a § 1983 claim.

of Claims Act, we reverse the district court's decision denying the deputies' motion to dismiss the state law claims.

III. CONCLUSION

We agree with the district court that the deputies are not entitled to absolute immunity, and therefore AFFIRM that portion of the district court's order denying the deputies' motion to dismiss Richman's § 1983 claims. Because we cannot conclude as a matter of law that the alleged unconstitutional policy at issue here was state policy for purposes of the Eleventh Amendment, we AFFIRM that portion of the district court's order denying the sheriff's motion to dismiss Richman's § 1983 claims. Finally, we conclude that the deputies' conduct would be attributed to the state for purposes of sovereign immunity under the Illinois State Lawsuit Immunity Act and Court of Claims Act, and therefore REVERSE that portion of the district court's order denying the deputies' motion to dismiss the state law claims.

BAUER, *Circuit Judge*, dissenting. I respectfully dissent. The majority finds *Martin v. Board of County Commissioners*, 909 F.2d 402 (10th Cir. 1990) "more persuasive" than *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997). The tenth circuit case involved police conduct in serving a bench warrant; the eighth circuit case is virtually on all fours with the instant case.

I have no quarrel with the result reached by the tenth circuit case; it differs not at all from the run-of-the-mill arrests made pursuant to any judicial warrant and, since the arrest takes place away from the courtroom and away

from the watchful eye of the judicial officer who issued the warrant, the conduct of the police is more likely to require a closer scrutiny. Nor is the immediate service of the warrant necessary to provide the court with the proper decorum needed to continue the work of the court.

The *Martin v. Hendren* case, like ours, however involves police officers under the immediate direction and supervision of a judge, following the judge's orders to restore or maintain order in the court instanter, doing precisely what they are sworn to do. Indeed, it is to do this job of maintaining order at the bidding of the judge that is the very reason they are present in the courtroom.

In formulating the finding granting these officers quasi-immunity, it is difficult to improve on the language of the majority opinion of the eighth circuit:

> [2-4] "Absolute quasi-judicial immunity derives from absolute judicial immunity." *Roland v. Phillips,* 19 F.3d 552, 555 (11th Cir. 1994). Judges are absolutely immune from suit for money damages when they act in their judicial capacity, unless their actions are "taken in the complete absence of all jurisdiction." *Duty* [*v. City of Springdale, Ark.*, 42 F.3d 460 (8th Cir. 1994)]. A judge's absolute immunity extends to public officials for "'acts they are specifically required to do under court order or at a judge's direction.'" *Robinson v. Freeze*, 15 F.3d 107, 109 (8th Cir. 1994) (quoting *Rogers v. Bruntrager*, 841 F.2d 853, 856 (8th Cir. 1988)). Like other officials, bailiffs enjoy absolute quasi-judicial immunity for actions "specifically ordered by the trial judge and related to the judicial function." *Id.* In subduing Martin, Hendren was acting as a de facto bailiff, obeying specific judicial commands to restore order in the courtroom. Those orders unquestionably related to the judicial function. *See Mireles v.*

Waco, 502 U.S. 9, 12-13, 112 S.Ct. 286, 288-89, 116 L.Ed.2d 9 (1991) (per curiam); *Terry v. State*, 303 Ark. 270, 796 S.W.2d 332, 335 (1990). Hendren is thus entitled to absolute quasi-judicial immunity from § 1983 liability for carrying out the judge's orders to handcuff Martin and remove her from the courtroom.

Martin argues that even if Hendren is absolutely immune from liability for implementing the judge's orders, Hendren ceased to act in a quasi-judicial capacity when he carried out those orders using excessive force. *See Martin v. Board of County Comm'rs*, 909 F.2d 402, 404-05 (10th Cir. 1990) (per curiam) (holding officers not absolutely immune for using excessive force in executing arrest warrant). After *Martin* was decided, however, the Supreme Court held a judge's order to use excessive force, issued in the judge's judicial capacity, was a judicial act for which the judge retained absolute immunity. *See Mireles*, 502 U.S. at 12-13, 112 S.Ct. at 288-89. The Court emphasized that the nature of the function being performed, not the particular act itself, controls the judicial immunity inquiry. *See id.* The Court rejected the idea that the impropriety of a judge's act strips the judge of immunity, reasoning that "[i]f judicial immunity means anything, it means that a judge 'will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority.'" *Id.* (quoting *Stump v. Sparkman*, 435 U.S. 349, 356, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331 (1978) (ellipsis in *Mireles*)). Although the *Mireles* Court did not address quasi-judicial immunity, we find the Court's reasoning persuasive in this context. Absolute quasi-judicial immunity would afford only illusory protection if it were lost the moment an officer acted improperly.

> Further, the officers in *Martin* were executing an arrest warrant away from the issuing judge's courtroom, *see Martin*, 909 F.2d at 403-04, but Hendren was carrying out a judicial command in the judge's courtroom and presence. Because judges frequently encounter disruptive individuals in their courtrooms, exposing bailiffs and other court security officers to potential liability for acting on a judge's courtroom orders could breed a dangerous, even fatal, hesitation. "For the criminal justice system to function, . . . courts must be able to assume their orders will be enforced." *Patterson v. Von Riesen*, 999 F.2d 1235, 1241 (8th Cir. 1993).

Martin v. Hendren, 127 F.3d 720, at 721-22.

As to the horrific scenario envisioned by Judge Lay's dissent, the court dryly (and properly!) responded ". . . we need not speculate about hypothetical situations testing the limits of our holding."

A decision reversing the trial court in the instant case is, in my opinion, both logical and necessary, if courtroom decorum is to be preserved at all. To suggest that the judge is absolutely immune from liability for requiring the bailiffs to take a person into custody for refusing the court's direction while exposing the bailiffs to liability has implications that go beyond the present case. A probable response (if it could be done without the bailiff being held in contempt) would be to suggest that the judge, cloaked with his or her immunity, step down and preserve order himself.

I continue to have sufficient faith in the judges who serve our courts to believe that they will oversee the bailiff or bailiffs who carry out their orders in the courtroom and make sure, by direction or otherwise, that the orders are properly carried out with the reasonable amount of force that the individual cases require.

I would reverse the district court and hold the bailiffs to be cloaked with immunity when carrying out the orders of the court relating to the conduct of court proceedings themselves. It follows then, that I would reverse the order denying the sheriff's motion to dismiss. I would join the majority in reversing the order denying the deputies' motion to dismiss the state law claims.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[Dated March 31, 2000]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARCELLA RICHMAN, individually and as Special Administrator of the Estate of Jack B. Richman, deceased,	)	
Plaintiffs,	)	
v.	)	No. 98 C 7350
	)	Judge Joan B. Gottschall
MICHAEL SHEAHAN, IN HIS OFFICIAL CAPACITY AS SHERIFF OF COOK COUNTY, THE COUNTY OF COOK, THE DEPARTMENT OF THE COOK COUNTY SHERIFF, BRIAN BURGESON, JOHN DORNER, BRIAN FOSTER, MARTY GANTMAN, RAYMOND GREVE, KELLY JACKSON, RICHARD KIM, LAURA LOKEN, MOIRA WEYRICH (n/k/a MOIRA LOWRY), JOSE MENDEZ, TIMOTHY MCPHILLIPS, EDWARD PICKELL, EDWARD PLUCINSKI, MAURICE SMITH, JEFFREY SULKIN, GEORGE VELISARIS, MIKE WISH AND MICHELLE ZIMMERMAN, INDIVIDUALLY,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Marcella Richman, individually and as administrator of the estate of her deceased son, Jack Richman, has brought suit against Michael Sheahan in his official capacity as Cook County Sheriff, Cook County,

the Department of the Cook County Sheriff,[1] and, in their individual capacities, eighteen sheriff's deputies. The suit arises from the courtroom death of Richman's son while he was being restrained by sheriff's deputies during a state court proceeding. In Counts I and III, Richman alleges that the sheriff's deputies violated her and her son's rights to be secure in their persons against unreasonable searches and seizures, their due process rights, and § 1983. In Counts II and IV, Richman alleges that the Cook County Sheriff, Cook County, and the Department of the Cook County Sheriff, as policy makers, failed to instruct, supervise, control and discipline the sheriff's deputies to refrain from using excessive force. In Counts V and VI, the Plaintiff alleges that all defendants are liable for compensatory and punitive damages pursuant to Illinois' Wrongful Death Act, 740 ILCS 180/1, and Survival Act 755 ILCS 5/27-6. Defendants have moved to dismiss all of Richman's claims.

Background

The court, as it must, accepts as true the facts alleged in the plaintiff's complaint. *Flynn v. Kornwolf*, 83 F.3d 924, 925 (7th Cir.), *cert. denied*, 519 U.S. 930 (1996). On or about November 18, 1997, Richman appeared in the Cook County Circuit Court before Judge Michael Jordan to challenge the issuance of a traffic citation issued against her. Her son accompanied her to testify on her behalf. Richman's case was placed at the end of the court call. After waiting in the courtroom for several hours, the case was called for hearing and immediately contin-

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[1] The court previously dismissed the Department of the Cook County Sheriff. (*See* 7/7/99 Min. Order)

ued to a future date by Judge Jordan. At the time Judge Jordan continued the case, Richman and her son attempted to ask him a question regarding it, but Judge Jordan quieted them. Immediately thereafter, her son spoke to Judge Jordan, who placed him in restraint.

After two sheriff's deputies began to restrain Richman's son, twelve more deputies entered the courtroom and joined them. Together, the fourteen deputies attacked her son, forced him to the floor, face down, and attempted to handcuff him. Richman's son, a physically disabled person who required the aid of a cane, was unable to, and did not, resist the attack. During the attack, he gasped for air and complained of pain and an inability to breathe. The deputies continued to physically restrain him, sat on him, and pulled his arms behind his back to secure him in the handcuffs. Sometime after handcuffing him, but while he remained on his stomach on the floor, one or more of the deputies noticed that her son's face and lips were blue, that he appeared not to be breathing, and that he had urinated and defecated upon himself. Subsequently, emergency assistance was called, and several paramedics entered the courtroom, administered CPR, and took him to the hospital, where he was pronounced dead.

While the fourteen deputies were restraining her son, four other deputies restrained Richman and forced her to leave the courtroom. Richman is an elderly woman who required the aid of a cane and was unable to and did not resist the attack.

Analysis

When considering a motion to dismiss, the court must examine the sufficiency of the complaint, not the merits

of the lawsuit. *Trial Assoc., Inc. v. Chicago House. Auth.*, 892 F.2d 583, 586 (7th Cir. 1989). The court must draw all inferences and resolve all ambiguities in the plaintiff's favor and assume that all well-pleaded facts are true. *Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993). A motion to dismiss will be granted only if the court finds that the plaintiff can prove no set of facts to support her allegations. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Cook County as Proper Defendant

The Illinois Supreme Court has held that the Cook County Sheriff "is a county officer and, as such, is not in an employment relationship with the County of Cook." *Moy v. County of Cook*, 640 N.E.2d 926, 931 (Ill. 1994). Accordingly, "the county may not be held vicariously liable for the sheriff's alleged negligent conduct." *Id.* Richman has offered no reason why the county-sheriff relationship is subject to a different analysis under the facts alleged in this case, nor has she offered an alternative basis for holding the county liable. Defendants' motion to dismiss Cook County is granted.[2]

Quasi-Judicial Absolute Immunity

Defendants argue that they are entitled to quasi-judicial absolute immunity because, in trying to restrain and remove Richman's son from the courtroom, they were

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[2] In her response brief, Richman argues that the Cook County Sheriff's Office is a proper defendant. This issue is not before the court, as it was not raised in defendants' motion to dismiss, and the Cook County Sheriff's Office is not named as a defendant in Richman's Amended Complaint.

acting pursuant to Judge Jordan's command. The Seventh Circuit has recognized that "[n]on-judicial officers whose official duties have an integral relationship with the judicial process are entitled to absolute immunity for their quasi-judicial conduct." *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1238 (7th Cir. 1986) (citing *Ashbrook v. Hoffman*, 617 F.2d 474, 476 (7th Cir. 1980)). Accordingly, "police officers, sheriffs, and other court officers who act in reliance on a facially valid court order are entitled to quasi-judicial immunity from suit under § 1983 for damages." *Id.* at 1239.

The court rejects Richman's argument that the deputies' restraint of an individual who had been held in contempt by the court and ordered removed from the courtroom was not a quasi-judicial function. The officers' conduct took place in the courtroom, was at the judge's express direction, and was integrally connected to the courtroom proceedings.

However, the fact that the sheriff's deputies acted pursuant to a court order does not give rise to blanket immunity under all circumstances. As the Tenth Circuit has recognized, "absolute immunity does not protect defendants from damages claims directed not to the conduct prescribed in the court order itself but to the manner of its execution." *Martin v. Board of County Comm'rs*, 909 F.2d 402, 405 (10th Cir. 1990); *see also Napier v. Jonas*, No. 1:94-CV-630, 1995 WL 454774, at *4 (W.D. Mich. Feb. 10, 1995) ("While quasi-judicial immunity protects court officers from the fact of their enforcement of a court order, it does not empower them to execute the court order with excessive force."). This common-sensical standard is grounded in the principle that "quasi-judicial immunity only extends to the conduct prescribed by the order." *Cortez v. Close*, No. 99 C

2397, 2000 WL 204232, at *3 (N.D. Ill. Feb. 10, 2000) (citing *Valdez v. Denver*, 878 F.2d 1285, 1286 (10th Cir. 1989)). The doctrine "does not immunize a sheriff's deputies for actions taken beyond those ordered by the court or authorized by the court order." *Id.* (citing *Rucinski v. United States*, 94 C 6619, 1995 WL 103 744, at *3 (N.D. Ill. Mar. 6, 1995)).

The court does not disagree with the Eighth Circuit's holding in *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997), that bailiffs and court-assigned deputies enjoy quasi-judicial immunity for actions specifically ordered by the trial judge and related to the judicial function. *Id.* at 721. However, the court disagrees with the Eighth Circuit's broad application of the Supreme Court's holding in *Mireles v. Waco*, 502 U.S. 9 (1991) to the conduct of non-judicial officers. The Eighth Circuit reasoned that if, as the *Mireles* Court held, a judge is absolutely immune from damages for ordering courtroom deputies to use excessive force, then deputies who use excessive force in carrying out a judicial order should also be absolutely immune—even if the order did not call for the use of excessive force—simply because of their close relationship to the judicial function. *See Martin v. Hendren*, 127 F.3d at 721-22 (citing *Mireles*, 502 U.S. at 12-13).

The distinction the Eighth Circuit draws between its approach in *Martin v. Hendren* and the Tenth Circuit's approach in *Martin v. Board of County Comm'rs*—*i.e.*, that *Martin v. Hendren* involved an unruly individual in the courtroom whereas *Martin v. Board of County Comm'rs* involved the execution of a judicial order outside the courtroom—does not strike this court as a basis for applying a different legal standard. Under the Eighth Circuit's reasoning, if a judge told deputies to subdue a

loud-mouthed litigant in her courtroom, a deputy who did so with lethal force would be absolutely immune. For this reason, the court believes that the Tenth Circuit rule is the better one.

Thus, to escape the preclusive effect of quasi-judicial immunity, Richman must allege that the deputies' conduct exceeded what was reasonably necessary to effectuate the court's order. By alleging that the deputies' "seizure of Decedent was excessive both in terms of sheer number of deputy sheriffs and force used" (Am. Compl. § 24), she has done so. Under our system of notice pleading, Richman's allegations are sufficient to defeat quasi-judicial immunity as to the fourteen sheriff's deputies who restrained her son.[3]

Because Richman's complaint does not allege that the four deputies who restrained and removed her did so pursuant to an order from the judge, they are not entitled to quasi-judicial immunity. Further, Richman's allegations against the Cook County Sheriff are based on his failure to train and supervise, not on acts performed pursuant to a court order. Accordingly, he is not entitled to quasi-judicial immunity.

Qualified Immunity

Defendants seek dismissal of the claims against the sheriff's deputies who seized Richman on the ground

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[3] The court notes that where, as here, a judge orders courtroom deputies to subdue a person, and the deputies proceed to carry out the order in the judge's presence, it will predictably be very difficult for a plaintiff to prove that the deputies were doing more than simply carrying out the judge's order.

that they are entitled to qualified immunity. "Police officers who use force in making an arrest are entitled to qualified immunity from suits for damages under 42 U.S.C. § 1983 insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Smith v. Darlin*, No. 97 C 0763, 1999 WL 498586, at *3 (N.D. Ill. Jul. 8, 1999) (quoting *Rice v. Burks*, 999 F.2d 1172, 1174 (7th Cir. 1993)). The court's inquiry is "concerned not with the state of mind or good faith of the government actor, but with the 'objective legal reasonableness' of his actions—in other words, with whether a reasonable police officer could have believed that [the officer's] conduct was constitutional 'in light of clearly established law and the information [he] possessed' at the time." *Frazell v. Flanigan*, 102 F.3d 877, 886 (7th Cir. 1996) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639, 641 (1987)).

Richman alleges that the four deputies used excessive force in seizing and removing her from the courtroom. In analyzing claims that an officer used excessive force, the objective reasonableness standard "requires the court to balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 882 (internal quotation marks omitted). A plaintiff may overcome a qualified immunity defense in one of two ways: (1) by pointing to a closely analogous case establishing in a sufficiently particularized sense the right at issue; or (2) by showing that the force used was so plainly excessive under the circumstances that a reasonable officer would have known of the constitutional violation. *See Darlin*, 1999 WL 498586, at *3-*5.

The court is not able to make this fact-intensive determination without a more developed factual record. The complaint does not allege that the judge ordered Richman's restraint and removal, nor is there any indication that the deputies' removal of her was justified. Accordingly, the court cannot determine the objective reasonableness of the deputies' use of force. Defendants may raise the qualified immunity issue on summary judgment, but to the extent they seek dismissal on that basis now, their motion is denied.

Eleventh Amendment Immunity

The Defendants maintain that the Eleventh Amendment bars Richman's § 1983 official capacity claim against the Cook County Sheriff.[4] The Eleventh Amendment bars all suits against a state or its agencies unless the state consents to suit in federal court or Congress uses its Fourteenth Amendment powers to abrogate the state's immunity. *Scott v. O'Grady*, 975 F.2d 366, 369 (7th Cir. 1992), *cert. denied*, 508 U.S. 942 (1993). A suit against a state official in her official capacity is deemed to be a suit against the state and thus is barred under the Eleventh Amendment. *Id.*

The court must determine whether Richman's allegations against the Cook County Sheriff are based on acts performed by the Sheriff as an agent of the State of Illinois. *See id.* at 370 (holding that if the sheriff and his deputy "were acting as agents of the State of Illinois when they forcibly evicted the Scotts, this lawsuit is a

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[4] The court does not address defendants' arguments as they apply to Cook County or the Cook County Sheriff's Department given its dismissal of those entities.

damage action against Illinois and is barred by the Eleventh Amendment"). If they are based on acts performed by the Sheriff as a county officer, the Eleventh Amendment is no bar to the claims. *See id.* at 371 ("[W]hen a county sheriff in Illinois performs his duties as the principal executive officer or chief law enforcement officer of the county, he acts as a county official and does not get the benefit of the Eleventh Amendment.").

Richman's claims against the Sheriff in his official capacity are based not on any direct role he played in carrying out the state court's order, but on his failure to train and supervise the deputies to refrain from using excessive force in their seizures of citizens. This alleged failure is not limited to deputies' conduct in effectuating state court orders. In that regard, this case is distinguishable from *Scott*, in which it was alleged that the Sheriff's policy and practice of carrying out state courts' Writs of Assistance were unlawful. *See id.* at 368-69. Because Richman's claims against the Cook County Sheriff are not based on his conduct as a state agent, the Eleventh Amendment does not bar the claims.

Court of Claims Jurisdiction

Defendants argue that the Illinois Court of Claims has exclusive jurisdiction over Richman's state law claims. It is well-settled that the State of Illinois may not be sued except as provided in the Court of Claims Act. *See Benning v. Board of Regents of Regency Universities*, No. 89 C 20072, 1990 WL 32305, at *3 (N.D. Ill. Feb. 12, 1990) (citing *Robb v. Sutton*, 498 N.E.2d 267, 270 (Ill. App. Ct. 1986)), *aff'd*, 928 F.2d 775 (7th Cir. 1991). "[T]he determination of whether or not an action is a suit against the state is dependent upon an analysis of

two factors—the issues involved and the relief sought—rather than a formal identification of the parties." *Id.* (quoting *Robb*, 498 N.E.2d at 270).

For the same reasons set forth in the court's analysis of defendants' Eleventh Amendment argument, the court finds that the Cook County Sheriff is not being sued as a state agent, but as an independent county official. Accordingly, the Court of Claims Act does not deprive this court of jurisdiction to hear the state law claims against him.

Where defendants are named in their individual capacities, as the sheriff's deputies have been here, the issue "is whether the suit is actually against the individuals or is against the individuals in name alone and really a claim against the state." *Id.* Even assuming that the sheriff's deputies were acting as state agents in carrying out the court's order, "[a] suit may be maintained against a state agent in an individual capacity if that agent acts illegally or outside the scope of permitted authority." *Id.* (citing *Robb*, 498 N.E.2d at 270). Because the complaint alleges that the sheriff's deputies acted illegally or outside the scope of their authority in their seizures of Richman and her son, the Court of Claims Act does not deprive this court of jurisdiction.

Immunity From State Law Claims Under Tort Immunity Act and Sheriff's Act

Defendants rely on three provisions[5] from Illinois' Tort Immunity Act and one from the Sheriff's Act in arguing

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[5] Defendants raise a fourth provision—745 ILCS 10/3-108—in their reply brief. The court will not address grounds for dismissal that are raised for the first time in reply.

that defendants are immune from Richman's state law claims. The first provision, 745 ILCS 10/2-204, provides that "[e]xcept as otherwise provided by statute, a public employee, as such and acting within the scope of his employment, is not liable for an injury caused by the act or omission of another person." At this stage of the case, the court cannot determine whether this will bar liability of any of the defendants. The complaint alleges that all of the sued public employees injured Richman and her son by committing wrongdoing in their own right. If the evidence indicates that certain employees' liability can only be based on the acts or omissions of others, this basis for immunity should be raised at the summary judgment stage.

The second provision relied on, 745 ILCS 10/2-201, provides that "[e]xcept as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." While the court has found for purposes of resolving this motion that the conduct alleged in the complaint was discretionary as to all defendants,[6] Richman nevertheless argues that this im-

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[6] Conversely, if the court were to find that the deputies' restraint of Richman or her son was ministerial, the state law claims against them would still fail because those deputies would be dismissed based on their entitlement to quasi-judicial immunity. *See Henry*, 808 F.2d at 1238 ("Although immunity is normally extended to those performing discretionary and not ministerial acts, 'those performing ministerial acts under a judge's supervision and intimately related to judicial pro-

(continued...)

munity does not apply because the scope of immunity in § 2-201 is limited by § 2-202 of the same Act, which provides that "[a] public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct." 745 ILCS 10/2-202.

The Illinois Supreme Court has rejected Richman's interpretation of the interplay between §§ 2-201 and 2-202, holding that:

> The plain language of section 2-201 is unambiguous. That provision does not contain an immunity exception for willful and wanton misconduct. Where the legislature has chosen to limit an immunity to cover only negligence, it has unambiguously done so. Since the legislature omitted such a limitation from the plain language of section 2-201, then the legislature must have intended to immunize liability for both negligence and willful and wanton misconduct. . . . Cases holding to the contrary . . . are overruled on this point.

In re Chicago Flood Litigation, 680 N.E.2d 265, 273 (Ill. 1997) (citations omitted).

Contrary to defendants' suggestion, however, this does not end the inquiry. Richman's allegations against the deputies who seized her son are not limited to negligent or willful and wanton conduct. She also alleges that those deputies acted maliciously. (*See* Am. Compl. 120)

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[6] (...continued)
ceedings have quasi-judicial immunity.'") (quoting *Ashbrook*, 617 F.2d at 477 n.4).

The *Chicago Flood* court did not "address the issue of whether corrupt, malicious or bad faith conduct by public officials is immunized by section 2-201." *Amati v. City of Woodstock*, Nos. 92 C 20347, 94 C 50235, 1997 WL 587493, at *5 (N.D. Ill. Aug. 7, 1997), *aff'd*, 176 F.3d 952 (7th Cir.), *cert. denied*, 120 S. Ct. 445 (1999). In light of previous state appellate court decisions holding that § 2-201 does not apply to such conduct, Richman's allegations, if proven, are sufficient to avoid the immunity granted by § 2-201. *See id.*

Richman does not allege that the deputies who seized her acted maliciously or in bad faith, nor that the Sheriff acted maliciously or in bad faith by failing to train the deputies. Her reliance on the "special duty doctrine" to escape immunity is unavailing, as the Illinois Supreme Court has held that the doctrine cannot override governmental immunities created by the Tort Immunity Act. *See Payne v. Churchich*, 161 F.3d 1030, 1044 n. 18 (7th Cir. 1998) (citing *Zimmerman v. Village of Skokie*, 697 N.E.2d 699,710 (Ill.1998)), *cert. denied*, 119 S. Ct. 2339 (1999). Accordingly, as currently alleged, the state law claims against the deputies who seized Richman and the Cook County Sheriff are barred by § 2-201.[7]

The final provision of the Tort Immunity Act on which defendants rely is 745 ILCS 10/2- 208, which states that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, unless he acts maliciously and without probable cause." Defen-

---

[7] Of course, § 2-201 does not operate as a bar to the § 1983 claims against these defendants. Immunity in that context is a matter of federal law. *See Payne*, 161 F.3d at 1038.

dants argue that the deputies were acting with probable cause pursuant to a valid judicial proceeding—i.e., the contempt action instituted by Judge Jordan against Richman's son.

By its terms, § 2-208 does not apply to the failure to train allegations against the Sheriff, nor to the claims against the deputies who seized Richman, given that there is no indication that the court ordered her seizure. Further, even assuming that the deputies' seizure of Richman's son falls within the scope of § 2-208, the court cannot determine at this stage that defendants acted without malice or with probable cause. This determination will depend, in significant part, on whether the deputies' conduct went beyond the scope of the court's order. Defendants may again raise § 2-208 once the factual record has been developed.

Contrary to defendants' insistence, the Sheriff's Act, 55 ILCS 5/5-1002, does not immunize the Cook County Sheriff from the state law claims brought against him. The provision cited by defendants addresses the circumstances under which a county is required to indemnify a sheriff or deputy for liability stemming from injuries caused by the sheriff or deputy in the performance of their duties. It does not bear on immunity. The case cited by defendants as support, *Chaney v. City of Chicago*, 901 F. Supp. 266 (N.D. Ill. 1995), is inapplicable. In that case, the plaintiff had sued the sheriff under 55 ILCS 5/3-6016, which provides that the sheriff "shall be liable for any neglect or omission of a duty of his or her office when occasioned by a deputy or auxiliary deputy, in the same manner as if his or her own personal neglect or omission." *See id.* at 268. The *Chaney* court held that the provision "only applies to the extent a complaint alleges that a deputy was negligent; it does not impose

liability on the sheriff for a deputy's intentional or wanton misconduct." *Id.*

In this case, Richman does not seek to impose liability against the Cook County Sheriff based on his deputies' negligence, but on the Sheriff's own failure to train and supervise. The statutory provision on which the *Chaney* court's holding is based has not even been invoked by Richman, and has no bearing on the immunity issues raised in this case.

Policy or Custom Requirement Under § 1983

Richman alleges that the sheriff's deputies acted pursuant to an official policy or custom of the Cook County Sheriff when they used excessive force against her and her son. Specifically, the complaint alleges that the policy or custom consists of the Sheriff's failure to train and supervise the deputies to refrain from using excessive force in restraining citizens. In *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989), the Supreme Court held that a failure to train can rise to the level of a policy or custom for purposes of a local government's § 1983 liability "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."

The Supreme Court has rejected attempts to impose a heightened pleading standard for § 1983 claims. *See Leatherman v. Tarrant County Narcotics Intell. and Coord. Unit*, 507 U.S. 163, 168 (1993). Thus, plaintiffs are not required to plead with particularity the facts upon which their failure to train claim is based, but need only provide a "short and plain statement of the claim that will give the defendant fair notice of what the plain-

tiff's claim is and the grounds upon which it rests." *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

By alleging that their § 1983 claims against the Sheriff are based on his failure to train and supervise deputies to refrain from using excess force in seizures, Richman has given the Sheriff adequate notice of the nature of the claims against him. Defendants' motion to dismiss Counts II and IV is denied.

Punitive Damages

Defendants argue that Richman's requests for punitive damages in her state law claims should be stricken. In her response, Richman asserts that she "does not seek punitive damages against any governmental entity, but rather, against the individual deputy sheriffs for their willful, wanton and vicious attack upon the decedent pursuant to Illinois' Wrongful Death Act, 740 ILCS 180/1 et seq., and the Survival Act, 755 ILCS 5/27-6." (Resp. at 33) Neither statute allows Richman to recover punitive damages. *See Burgess v. Clairol, Inc.*, 776 F. Supp. 1278, 1280 (N.D. Ill. 1991) ("[I]t is well-settled that the Illinois Wrongful Death Act does not allow for the decedent's surviving spouse and next of kin to recover punitive damages.")[8]; *Ballweg v. City of Springfield*, 499 N.E.2d 1373, 1377 (Ill. 1986) ("Illinois law is clear that punitive damages are not recoverable under the Survival Act.").

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[8] The fact that Richman brings her claims in her own behalf and as the administrator of her son's estate does not change this analysis, given that "[i]n a wrongful death action, the amount recovered shall be for the exclusive benefit of the surviving spouse and next of kin." *Bass v. Wallenstein*, 769 F.2d 1173, 1188 n.15 (7th Cir. 1985).

Accordingly, Richman's claims for punitive damages under Counts V and VI of her complaint are dismissed. Further, to the extent Richman purports to bring claims for punitive damages under § 1983 against the Cook County Sheriff in his official capacity, such claims are dismissed. *See City of Newport v. Fact Concerts*, 453 U.S. 247, 271 (1981).

Conclusion

Defendants' Motion to Dismiss is granted in part and denied in part, as set forth above. Cook County is dismissed. The state law claims against the Cook County Sheriff and the deputies who allegedly restrained and removed Richman from the courtroom—Kelly Jackson, Laura Loken, Timothy McPhillips, and Michelle Zimmerman—are dismissed based on their entitlement to immunity under 745 ILCS 10/2-201. Richman's claims for punitive damages under Counts V and VI are dismissed, as are any punitive damages claims she purports to bring under § 1983 against the Cook County Sheriff in his official capacity.

ENTER:

/s/ Joan B. Gottschall
JOAN B. GOTTSCHALL
United States District Judge

DATED: March 31, 2000

(2)

No. 01-1215

Supreme Court, U.S.
FILED
FEB 28 2002

In The

Supreme Court of the United States

BRIAN BURGESON, JOHN DORNER, BRIAN FOSTER, MAURY GANTMAN, RAYMOND GREVE, KELLY JACKSON, RICHARD KIM, LAURA LOKEN, MOIRA WEYRICH, JOSE MENDEZ, TIMOTHY McPHILLIPS, EDWARD PICKELL, EDWARD PLUCINSKI, MAURICE SMITH, JEFFREY SULKIN, GEORGE VELISARIS, MIKE WISH and MICHELLE ZIMMERMAN, in their individual capacities,

Petitioners,

v.

MARCELLA RICHMAN, individually and as Special Administrator of the Estate of JACK B. RICHMAN, deceased,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should not this Court deny certiorari where: (1) a circuit court has ruled that law enforcement officers who exceed the scope of a judge's order to restrain a person, and use excessive force in violation of the Fourth Amendment, are protected only by qualified immunity from section 1983 damages liability, not absolute immunity; (2) only one other circuit court has thus far directly ruled on the question, although to the contrary; (3) the challenged circuit court decision does not conflict with any decisions of this Court; and (4) the circuit court got it right because the officers' conduct is executive in nature and not judicial, absolute quasi-judicial immunity is inconsistent with the 1871 common law of torts, and the relevant policy considerations do not support absolute immunity?

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STATEMENT OF THE CASE

A. FACTS[1]

Jack Richman went to the Circuit Court of Cook County, Illinois, to testify on a traffic ticket for his mother, Respondent Marcella Richman. Amended Complaint (AC) ¶¶5, 10. Jack walked into the courthouse with a cane, because he was disabled. AC¶18. But he was carried out of the courthouse on a stretcher, because he was dying. AC¶27. The Petitioners, fourteen deputy sheriffs, saw to that. AC¶¶15, 16.

Two of these deputy sheriffs were actually in the courtroom when the presiding judge told them to restrain Jack because of Jack's refusal to stop talking. AC¶15. But the other twelve never heard the judge's directive, because they came into the courtroom, and pounced on Jack, only *after* the judge issued his command. AC¶16. Although Jack did not, and could not, resist the restraint, the deputy sheriffs used excessive force against him: they forced him to the floor, face down, they sat on him, and they pulled his arms behind his back to handcuff him. AC¶¶17, 18, 20, 22-3. Jack gasped for air, and complained of pain and an inability to breathe. AC¶19. Finally, one or

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[1] Like the District Court, and the Court of Appeals, Richman bases her recitation of the facts solely on the allegations of her amended complaint which, for purposes of a motion to dismiss, are taken as true. *Conley v. Gibson*, 355 U.S. 41 (1957). Unlike the Petitioners, Richman does not rely improperly on a superseded pleading to embellish her factual discussion. Pursuant to this Court's Rule 15.2, Richman objects to the Petitioners' reference to facts *dehors* the amended complaint.

more of the deputy sheriffs noticed that Jack's face and lips were blue, that he appeared to have stopped breathing, and that he had emptied his bladder and bowels. AC¶21. Paramedics were called and, upon arrival, they administered CPR, and took him to a hospital, where he was pronounced dead. AC¶27.

Marcella watched the attack on her son from the sidelines. AC¶19. Although she too was disabled, and could not resist, four other deputy sheriffs restrained her, and then removed her from the courtroom. AC¶¶19-21. In all, eighteen deputy sheriffs restrained this elderly, disabled woman and her disabled son. AC¶¶16, 19.

B. PROCEEDINGS BELOW

Count I of Marcella Richman's amended complaint seeks damages from the fourteen deputy sheriffs, the Petitioners, in their individual capacities, pursuant to 42 U.S.C. § 1983, for their killing of Jack Richman, which violated his rights under the Fourth and Fourteenth Amendments.[2] The fourteen deputy sheriffs moved to dismiss this claim, contending that their actions were protected by the absolute immunity afforded to judges. *Cf. Mireles v. Waco*, 502 U.S. 9 (1991) (judge who ordered police officers to seize lawyer with "excessive force" absolutely immune.)

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[2] Marcella Richman brings this claim on behalf of her son's estate. She also asserts other claims, both individually and on behalf of her son's estate, which are not relevant to the pending petition.

Although, in contrast to the instant case, *Mireles* involved an explicit command from a judge to use "excessive force" (502 U.S. at 10), the deputy sheriffs here nevertheless analogized their behavior to that of the police officers in *Mireles*. The deputy sheriffs here argued that they have a duty, established by Illinois statute, to obey all "lawful orders and directions of the court" (55 ILCS 5/3-6023), and that this duty absolved them of any responsibility for the *manner* in which they carried out the judge's directive.

The District Court disagreed, and denied their motion. *Richman v. Sheahan*, No. 98 C 7350, 2000 U.S. Dist. LEXIS 5861 (N.D. Ill. March 31, 2000), *aff'd in part, rev'd in part*, 270 F.3d 430 (7th Cir. 2001). In so doing, the court noted the contrast between the Tenth Circuit's holding in *Martin v. Board of County Commissioners*, 909 F.2d 402 (10th Cir. 1990), where a challenge to the *manner* in which officers carried out a judge's order was not barred by absolute immunity, and *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997), where it was. 2000 U.S. Dist. LEXIS 5861 at 6-10. According to the District Court, the Tenth Circuit's approach was the better one, since it recognized a "common-sensical standard" whereby immunity protects officers from the fact of their enforcement of an order, but does not protect them from their use of excessive force not prescribed by the order. *Id.* at 7-8. According to the District Court:

> Under the Eighth Circuit's reasoning, if a judge told deputies to subdue a loud-mouthed litigant in her courtroom, a deputy who did so with lethal force would be absolutely immune. For this reason, the court believes the Tenth Circuit rule is the better one. *Id.* at 9.

The Seventh Circuit Court of Appeals affirmed. *Richman v. Sheahan*, 270 F.3d 430 (7th Cir. 2001). According to that court:

> The policies articulated by our quasi-judicial immunity cases have less force when, as in this case, the challenged conduct is the manner in which the judge's order is carried out, and not conduct specifically directed by a judge. *Reading Richman's complaint in the light most favorable to her, the claim is not that the judge ordered the deputies to use unreasonable force, but that the deputies exceeded the judge's order by the manner in which they executed it.* The claim for damages in this case is not therefore a collateral attack on the judge's order (an order that Richman concedes was valid), and an appeal of the judge's order would provide no remedy. Similarly, *the deputies are not being called upon to answer for wrongdoing directed by the judge, but instead for their own conduct.* And that conduct – the manner in which they enforced the judge's order – implicates an executive, not judicial, function. 270 F.3d at 437-8 (emphasis supplied).

The Seventh Circuit went on to stress the importance of this functional approach, and to square this approach with the policy of immunity.

> A secure courtroom is necessary to protect the judicial function from interference or intimidation; this function is adequately protected by immunizing a judge's order to restrain a person *see Mireles*, 502 U.S. at 12-13, 112 S.Ct. 286, and by barring lawsuits that challenge a judge's decision through claims aimed at officers who do nothing more than implement it. *See Henry*,

> 806 F.2d at 1238-39. It is not necessary to the judicial function, in our judgment, to also deny a remedy to plaintiffs who were harmed not by the judge's order, but by unlawful conduct by those who enforce it. We therefore affirm the district court's denial of the deputies' motion to dismiss the plaintiff's § 1983 claims. 270 F.3d at 438-9.

The Seventh Circuit's decision was, pursuant to its Rule 40(e), circulated to the full Court of Appeals. A majority of the full court did not favor rehearing en banc, although one judge, who also dissented from the panel's decision, voted to grant rehearing. 270 F.3d at 439, 443.

SUMMARY OF ARGUMENT

This case does *not*, contrary to Petitioners' mischaracterization, involve a section 1983 challenge, direct or indirect, to the validity of a judge's order and it does *not* involve a judge's immediate direction and supervision. Rather, it more narrowly deals with the scope of immunity of the Petitioner deputy sheriffs who, when instructed by a state court judge to restrain Respondent's son, exceeded the scope of the judge's order, used excessive force in violation of the Fourth Amendment and thereby caused the death of Respondent's son. On this issue the Seventh Circuit ruled that Petitioners are not protected by absolute quasi-judicial immunity from section 1983 damages liability.

This Court should deny the Petition for several reasons. First, it would be premature at this time to hear this case because only three circuits, the Seventh, Eighth and

Tenth Circuits, have thus far considered the issue, and only the holdings of the Seventh and Eighth Circuits directly conflict. The Eighth Circuit's decision in *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997), which found absolute quasi-judicial immunity applicable, was, furthermore, accompanied by a powerful dissent. The Tenth Circuit's decision in *Valdez v. City of Denver*, 878 F.3d 1285 (10th Cir. 1989), which found quasi-judicial immunity applicable to law enforcement courtroom conduct prescribed by court order, was subsequently expressly distinguished by the Tenth Circuit itself as not governing those cases in which law enforcement officers exceeded the scope of a judge's order and violated a person's constitutional rights. *Martin v. Board of County Commissioners*, 909 F.2d 402 (10th Cir. 1990). Finally, in this case the Seventh Circuit analyzed these Eighth and Tenth Circuit decisions and concluded, over a dissent which followed the unsound reasoning of the Eighth Circuit in *Hendren*, that absolute quasi-judicial immunity was not applicable.

Three circuit decisions, with none of them en banc, with only two of them strictly on point, and with dissents in both, do not warrant the grant of certiorari. The issue should be allowed to percolate in other circuits and receive further analysis before this Court expends its scarce resources and decides to resolve any conflict.

A second reason for denying the Petition is that, contrary to the Petitioners' contention, the Seventh Circuit's decision does not in any way conflict with this Court's judicial immunity decision in *Mireles v. Waco*, 502 U.S. 9 (1991). *Mireles* dealt with a section 1983 damages action against a judge challenging the constitutionality of

a court order. In marked contrast, *this case does not involve a challenge to the state court judge's order either directly or indirectly*. There is no direct challenge to the judge's order because the judge was not sued by Respondent. There is similarly no indirect challenge because the Petitioners are accused of going beyond the scope of the judge's order in using unconstitutional excessive force against Respondent's son, the decedent.

A third reason for denying the Petition is that the Seventh Circuit got it right. It correctly concluded after careful analysis that absolute quasi-judicial immunity is not applicable to challenged law enforcement conduct that goes beyond the scope of a judge's order. This Court's case law emphasizes a functional approach to immunities and, under that approach, the challenged conduct of the Petitioners is executive in nature and not judicial. *Forrester v. White*, 484 U.S. 219 (1988). Also, absolute quasi-judicial immunity is inconsistent with the common law immunity background of section 1983, *Tenney v. Brandhove*, 341 U.S. 367 (1951), against which section 1983 is to be interpreted: a sheriff was not protected by absolute quasi-judicial immunity for such conduct under the common law extant in 1871 when section 1983 was enacted, and such conduct was not considered judicial in nature under that common law. Finally, the policy considerations ordinarily supporting absolute immunity are insufficient to do so here. *Burns v. Reed*, 500 U.S. 478 (1991).

REASONS FOR DENYING THE WRIT

I. INSUFFICIENT CONSIDERATION HAS BEEN GIVEN BY THE CIRCUITS TO THE NARROW ISSUE PRESENTED IN THIS CASE; THUS, IT WOULD BE PREMATURE TO GRANT THE PETITION.

Petitioners mischaracterize this case as involving bailiffs who were sued for merely following a judge's order to restrain a party. As discussed later – *see* Argument II *infra* – they do so in an obvious attempt to implicate judicial immunity and *Mireles v. Waco*, 502 U.S. 9 (1991). In reality, however, this particular case involves the law enforcement conduct of deputy sheriffs and *not* bailiffs, and these deputy sheriffs did not engage in the conduct prescribed by a court order but exceeded its scope when they used excessive force and thereby violated the seized person's Fourth Amendment rights. As thus correctly described, there is currently an insufficient body of circuit case law dealing with this issue to warrant the grant of certiorari. Rather, the issue calls for further reasoned analysis and consideration by other circuits so that it is fully fleshed out before coming to this Court.

Only three circuits – the Seventh (the present case), Eighth and Tenth – have thus far even discussed the specific issue presented by this case. The Eighth Circuit ruled in *Martin v. Hendren*, 127 F.3d 720 (8th Cir. 1997), that absolute quasi-judicial immunity applied to protect law enforcement officers who enforced a court's restraint order even though the challenged conduct exceeded the scope of the order and, because it constituted excessive force, violated the Fourth Amendment. However, there was a powerful dissent by Judge Lay, *id.* at 722. He

contended that the majority had ignored the crucial distinction between a section 1983 damages action against a law enforcement officer who *legally* enforced a court order, which is in effect a suit directed at the court order itself and thus protected by absolute quasi-judicial immunity, and a section 1983 damages action directed against a law enforcement officer sued for carrying out a court order in an *unlawful* manner.[3]

The Tenth Circuit decision, *Martin v. Board of County Commissioners*, 909 F.3d 402 (10th Cir. 1990), involved a section 1983 damages action against deputy sheriffs alleging that they used excessive force in executing a search warrant. Distinguishing its earlier decision in *Valdez v. City of Denver*, 878 F.2d 1285 (10th Cir. 1989), which Petitioners incorrectly claim is consistent with their position,[4] the Tenth Circuit emphasized that while absolute

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[3] Judge Lay also maintained that the majority had departed from its own precedent in *Robinson v. Freeze*, 15 F.3d 107 (8th Cir. 1994), and that its reliance on *Mireles* was flatly wrong. In his view, *Mireles* was inapplicable to *Hendren* because it dealt with the absolute immunity of judges, not with those who enforce court orders. He argued, 127 F.3d at 723:

> Under the majority's reasoning, if a judge orders a bailiff to remove a litigant from the courtroom, and the bailiff decides that the most expeditious way to accomplish this order is to bash the litigant in the head with a baseball bat, the bailiff would enjoy absolute immunity. This is not the type of action the doctrine of absolute immunity is designed to protect.

[4] In *Valdez*, the officers were sued for their compliance with a facially valid court order of contempt, and *not* for the manner in which they complied. Thus, it was the *judge's order* that was the target of the plaintiffs in *Valdez*.

quasi-judicial immunity might protect the deputy sheriffs "from liability for the actual arrest, it does not empower them to execute the arrest with excessive force." *Id.* at 404. It reasoned that "a judicial warrant contains an implicit directive that the arrest and subsequent detention be carried out in a lawful manner." *Id.* at 405. But to the extent that the defendants in *Martin* "exceeded legal bounds in executing the warrant for arrest, defendants have *a fortiori* violated the very judicial order under which they seek the shelter of absolute immunity." *Id.* Thus, according to the Tenth Circuit, absolute quasi-judicial immunity did *not* extend to the manner of the execution of a court order.

Finally, in the present case, the Seventh Circuit, after considering these decisions of the Eighth and Tenth Circuits, held that absolute quasi-judicial immunity did not apply to the Petitioner law enforcement officers who used excessive force in violation of the Fourth Amendment when they attempted to enforce a state judge's courtroom order restraining the plaintiffs. It found *Mireles* inapplicable because: the judge's contempt order was not challenged; the Petitioners' conduct was executive in nature and not judicial; the policy considerations underlying absolute immunity did not apply; and the possible availability of qualified immunity provided sufficient protection for Petitioners. Judge Bauer dissented, *Richman v. Sheahan*, 270 F.3d 430, 444 (7th Cir. 2001), essentially arguing that the Eighth Circuit was correct in *Hendren*.

Significantly, the Seventh Circuit is only the second circuit to rule explicitly on the issue raised. The Tenth Circuit's 1990 decision in *Martin*, whose reasoning supports Respondent's position, did not involve a judge's

courtroom order. And the Tenth Circuit's earlier 1989 decision in *Valdez*, which was thereafter distinguished in *Martin*, dealt with a judge's courtroom order that was itself the object of the section 1983 plaintiff's challenge. Thus, only the Seventh and Eighth Circuits, each 2-1, have dealt with the issues presented by this case, with admittedly conflicting results.

This conflict between only two circuits and among four (or six) judges is not sufficient to warrant a grant of certiorari. The issues of section 1983 interpretation, common law background and policy should be fleshed out by other circuits that will have the benefit of the very different reasoning of the Seventh and Eighth Circuits. After the other circuits decide whose reasoning is more persuasive, there will be time enough to grant certiorari to resolve any then-existing conflict.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *MIRELES V. WACO* BECAUSE THE CHALLENGED CONDUCT OF PETITIONERS IS NOT JUDICIAL IN NATURE.[5]

Petitioners strain mightily to create a conflict between the Seventh Circuit's decision and this Court's decision in *Mireles v. Waco*. But as the Seventh Circuit soundly noted (as did Judge Lay in his dissent in the Eighth Circuit's *Hendren* decision), *Mireles* is clearly inapposite. In *Mireles*, the plaintiff lawyer sued a judge for

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[5] In Argument III, *infra*, Respondent contends that Petitioners' challenged conduct is clearly executive in nature.

allegedly ordering police officers to seize him with excessive force and to bring him before the judge in his courtroom. This Court held that the judge was protected by absolute immunity because (1) he acted within his jurisdiction and (2) his conduct ordering that a lawyer be brought to him in connection with a pending case was a judicial act.

In relying on *Mireles* for the proposition that using excessive force in connection with judicial proceedings is judicial in nature, Petitioners obscure the all-important fact – which the Seventh Circuit emphasized – that the challenged conduct in *Mireles* was the *judge's* alleged order to the police officers to use excessive force to bring the lawyer before him, and *not* the use of excessive force by the police officers themselves. Only the former was held by this Court to be protected by absolute immunity. In marked contrast to the situation in *Mireles*, Respondent did not sue Judge Jordan for requesting that the decedent be restrained, but rather sued the Petitioner deputy sheriffs who restrained the decedent with excessive force and thereby caused his death.

In effect, Petitioners argue that because Judge Jordan is (or would be) absolutely immune for ordering them to detain the decedent, they, too, should be absolutely immune. But this contention must fail. If Judge Jordan had himself stepped down from the bench and physically restrained decedent, then such conduct would not be judicial in nature because it is unrelated to the functions usually performed by judges and is contrary to the expectations of litigants. *See Stump v. Sparkman*, 435 U.S. 349, 362 (1978) ("[T]he facts determining whether an act by a judge is a 'judicial one' relate to the nature of the act

itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity."). *Cf. Gregory v. Thompson*, 500 F.2d 59, 63 (9th Cir. 1974) ("The decision to personally evict someone from a courtroom by the use of physical force is simply not an act of a judicial nature, and is not such as to require insulation in order that the decision be deliberately reached.")

Respondent certainly does not dispute the importance of the executive act of restraining persons in a courtroom in appropriate circumstances, particularly those involving contemptuous behavior. Rather, Respondent argues, and the Seventh Circuit agreed, that such conduct is not judicial in nature and hence not protected by absolute quasi-judicial immunity. As this Court reasoned in *Forrester v. White*, 484 U.S. at 229, where it rejected a judge's contention that he was entitled to absolute immunity for allegedly firing a probation officer because of her sex: it does not follow from the importance of administrative acts for a sound adjudicative system (like the supervision of court employees and overseeing the efficient operation of a court) that those acts are protected by absolute immunity.

Thus, the Seventh Circuit's decision does not conflict with this Court's decision in *Mireles*.

III. THE SEVENTH CIRCUIT CORRECTLY RULED THAT THE PETITIONER DEPUTY SHERIFFS ARE NOT PROTECTED BY ABSOLUTE QUASI-JUDICIAL IMMUNITY.

This Court should not grant certiorari because the Seventh Circuit got it right.

The Seventh Circuit first carefully distinguished between the question of "whether the challenged conduct was specifically ordered by the judge" and "the separate question of whether the conduct was lawful or exceeded the judge's order directly." It then observed that the Eighth Circuit in *Hendren* had failed to make this distinction, which accounted for that court's misplaced reliance on *Mireles*. Next, it emphasized that its quasi-judicial immunity cases were intended to protect judicial or quasi-judicial decision making, and that such decision making was not involved here because Respondent did not challenge any conduct of Petitioners that was specifically directed by the judge. For this reason, the policy considerations implicated in its quasi-judicial immunity cases had relatively little force in this case.

According to the Seventh Circuit, the policy considerations set out by the Eighth Circuit in *Hendren* were similarly insufficient to justify absolute immunity. Rather, qualified immunity – the standard ordinarily applied to law enforcement officers, *see Pierson v. Ray*, 386 U.S. 547 (1967) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) – more than adequately took account of the need for law enforcement officers such as Petitioners to balance the necessity of quick action in the courtroom on the one hand, and compliance with constitutional standards on the other.

While absolute immunity was surely vital for the protection of the judge's decision making, "[i]t is not necessary to the judicial function, in our judgment, to also deny a remedy to plaintiffs who were harmed not by the judge's order, but by unlawful conduct by those who enforce it." Thus, the Petitioners were not entitled to absolute quasi-judicial immunity.

The Seventh Circuit's decision is sound because: (1) the challenged conduct of Petitioners is executive in nature; (2) the common law immunity background does not support a quasi-judicial immunity rule for Petitioners; and (3) relevant policy considerations support only a qualified immunity rule in cases like this.

A. The Petitioners' Challenged Conduct is Executive in Nature.[6]

This Court has repeatedly declared that, for absolute and qualified immunity purposes, it is not a defendant's status that is determinative but rather the challenged conduct and its function. *See, e.g., Forrester v. White, supra,* which applied a functional approach and held that judges are not protected by absolute immunity for their administrative conduct in hiring and firing, and *Burns v. Reed, supra,* which applied a functional approach and held that prosecutors are not protected by absolute immunity for giving legal advice. In the present case, there can be little doubt that the challenged conduct is not judicial in nature

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[6] In Argument II, *supra,* Respondent makes the related argument that the challenged conduct of Petitioners is not judicial in nature.

– *see* Argument II, *infra* – but rather executive. Restraining a citizen with force and arresting him or her are quintessentially executive functions for immunity purposes. *See Pierson v. Ray, supra,* dealing with warrantless arrests by law enforcement officers, and *Malley v. Briggs,* 475 U.S. 335 (1986), involving an arrest pursuant to warrant by law enforcement officers. *See also Graham v. Connor,* 490 U.S. 386 (1989), dealing with the use of excessive force in making an arrest. Such acts clearly are not judicial rulings. *Forrester v. White,* 792 F.2d 647, 658 (7th Cir. 1986) (Judge Posner dissenting, arguing that there was nothing in Supreme Court case law or policy to warrant the expansion of judicial immunity beyond judicial rulings), *rev'd,* 484 U.S. 219 (1988).

That Judge Jordan in his courtroom may have requested that the Petitioners take and detain the decedent does not convert Petitioners' executive law enforcement conduct into judicial conduct protected by absolute quasi-judicial immunity any more than a police officer's enforcement of a statute or ordinance converts that conduct into absolutely immune quasi-legislative conduct. As argued earlier, *Mireles v. Waco* clearly does not support Petitioners' position on this issue.

Thus, the challenged law enforcement conduct of Petitioners should receive qualified immunity protection at best because it is executive in nature.

B. The Common Law Immunity Background Does Not Support a Quasi-Judicial Immunity Rule.

In *Antoine v. Byers & Anderson,* 508 U.S. 429 (1993), this Court rejected the absolute quasi-judicial immunity

argument of a court reporter sued for failing to produce a transcript of a federal criminal trial. In so doing, and finding qualified immunity applicable instead, it articulated the appropriate approach where absolute immunity is claimed:

> The proponent of a claim to absolute immunity bears the burden of establishing the justification for such immunity. In determining which officials perform functions that might justify a full exemption from liability, "we have undertaken a 'considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.' "

Antoine v. Byers & Anderson, 508 U.S. at 430 (quoting *Butz v. Economou*, 438 U.S. 478, 508 (1957)) (citations omitted). This Court in *Antoine* also observed that "[t]he presumption is that qualified immunity rather than absolute immunity is sufficient to protect government officials in the exercise of their duties, [and] we have been quite sparing in our recognition of absolute immunity, and have refused to extend it any further than its justification would warrant." 508 U.S. at 432 n.4 (quoting *Burns v. Reed*, 500 U.S. at 486-487).

An inquiry into the relevant common law tort immunity background through study of treatises by Cooley and Mechem[7] demonstrates that sheriffs and deputy sheriffs

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[7] The treatises are T. Cooley, *Law of Torts* (1880) and F. Mechem, *The Law of Public Offices and Officers* (1890) (hereafter "Cooley" and "Mechem"). Both of these treatises are regularly resorted to by this Court in determining the relevant common law immunity background in the fourth quarter of the 19th century.

who used excessive force in making an arrest or otherwise restraining citizens were not protected from tort liability when section 1983 was enacted in 1871. These treatises also make clear that arresting or restraining someone was not considered a judicial act under the then-extant common law, even though doing so involved the exercise of judgment.

Thus, Cooley states that a defendant under arrest is entitled to be treated with ordinary humanity by a sheriff, and, for purposes of tort liability, any unnecessary severity cannot be justified by the arrest writ. Cooley, *supra* at 395. He also declares that a sheriff must not make any mistakes in connection with the execution of a writ. Cooley expressly rejects the argument that a ministerial mistake by a sheriff is a judicial act just because the sheriff must exercise judgment. In his view of the relevant tort law, the exercise of judgment cannot be the test between a judicial act and a ministerial act of the sort engaged in by sheriffs regarding executions of writs because the underlying factual question is referred by the law to the sheriff himself. *Id.* at 396. Cooley explains:

> It is difficult to name any subject in respect to which questions may not be raised; and if the existence of a question could be the test between [protected] judicial and [unprotected] ministerial action, there would be very little that would be classed as ministerial. Judicial action implies not merely a question, but a question referred for solution to the judgment or discretion of the officer himself.

Id. In the present case, Cooley's point applies analogously to the state law referral to the deputy sheriffs of the

decision of how much force to use in arresting the decedent. 55 ILCS 5/3-6015 (powers of deputies); 55 ILCS 5/3-6016 (sheriff liable for acts of deputies); 55 ILCS 5/3-6021 (sheriffs responsible to keep the peace). It was *they* who decided how to restrain the decedent, not Judge Jordan.

Mechem is even more supportive of plaintiff's position. Thus, his list of quasi-judicial officers and functions in section 639 of his treatise does not include anything resembling the making of an arrest. Mechem, *supra* at 421-24. Also, while characterizing service of process by sheriffs, marshals, coroners and constables as ministerial, *id.* at 485, he points out, as Cooley does, that a quasi-judicial official who acts ministerially can be liable in tort because an act can be ministerial even if it involves skill, judgment and discretion. *Id.* at 429. He further declares that a sheriff can be liable for abuse of process in making an arrest, *id.* at 514, and for the arrest of the wrong person, even though the sheriff's mistake was reasonable. *Id.* at 518.

Consequently, the relevant common law immunity background for sheriffs and their deputies and the common law's characterization of a sheriff's abuse of process in making an arrest do not support the grant of absolute quasi-judicial immunity to the Petitioners in this case.

C. Relevant Policy Considerations Support Only a Qualified Immunity Rule in Cases Like This.

In light of this Court's strong presumption against absolute quasi-judicial immunity and the common law background of no absolute immunity for the challenged

conduct in this case, Respondent need go no further in support of the Seventh Circuit's decision. She knows of no section 1983 immunity decision of this Court in which strong policy considerations trumped a common law background of no absolute individual immunity.[8] Nevertheless, Respondent feels constrained to respond to various policy considerations set out in *Hendren, supra,* and *Valdez v. City of Denver, supra,* on which Petitioners (and Judge Bauer in his dissent in this case) so extensively rely.

The *Hendren* court's observation that absolute quasi-judicial immunity is necessary to protect law enforcement officers in courtrooms from "dangerous, even fatal, hesitation," and the *Valdez* court's suggestion that losing parties would threaten officers with "harassing litigation" are not persuasive. Those purposes, together with the admittedly important interest in fairness to government officials, are more than adequately served by qualified immunity which protects officers who act with objective reasonableness in light of clearly settled law from damages liability. *Harlow v. Fitzgerald, supra.* Moreover, qualified immunity has been transformed by this Court from *liability* immunity into *suit* immunity to such an extent that discovery is typically postponed until the qualified immunity issue is resolved, *Harlow v. Fitzgerald, supra,* as the district court has in fact done in the present case. These doctrinal developments in qualified immunity law

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[8] To the contrary: strong policy considerations can trump a common law background of absolute immunity, as this Court held in *Scheuer v. Rhodes,* 416 U.S. 232 (1974) (governors are protected by qualified immunity from section 1983 damages liability despite absolute immunity at common law).

provide more than enough protection to the Petitioners here and those similarly situated when they exceed a court's prescribed order and act unconstitutionally.

Furthermore, this Court rejected a similar "harassing litigation" argument for absolute quasi-judicial immunity for court reporters in *Antoine v. Byers & Anderson, supra*. It responded, first, that cases involving court reporters were comparatively rare. This is the case here as well because "[Petitioners] have not provided us with empirical evidence demonstrating the existence of any significant volume of vexatious and burdensome actions against [deputy sheriffs accused of using excessive force in courtrooms]. . . . " *Antoine v. Byers & Anderson*, 508 U.S. at 437. This Court's second response was that if a large number of cases did materialize, then Congress could act. Similarly, Congress can amend section 1983 if it wishes to protect deputy sheriffs in the circumstances of our case.[9] Hence, in light of the adequate protection offered the defendants by qualified immunity and the strong compensation function of section 1983, *Carey v. Piphus*, 435 U.S. 247 (1978), absolute quasi-judicial immunity is not warranted in this case.

For all of these reasons – the crucial distinction between an executive act and a judicial one, the relevant case law of this Court, the 1871 common law background

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[9] For example, confronted with what it considered to be an unduly large number of vexatious suits against prison officials, Congress enacted the Prison Litigation Reform Act, Pub. L. No. 104-134, 1996 HR 3019.

of no absolute immunity and relevant policy considerations – the Seventh Circuit correctly ruled that the Petitioner deputy sheriffs were not entitled to quasi-judicial immunity.

CONCLUSION

Because the narrow issue raised by this Seventh Circuit case has only been ruled on by one other circuit, the Eighth, it would be premature to grant the Petition. The circuits should study the issue more thoroughly before this Court expends its limited resources by intervening at this time. Furthermore, contrary to Petitioners' argument, there is clearly no conflict between the Seventh Circuit's decision and this Court's decision in *Mireles v. Waco*, which deals with the immunity of judges for their judicial acts. Finally, the Seventh Circuit decided this case correctly. Thus, Respondent respectfully requests that this Court deny the Petition.

Respectfully submitted,

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In the Supreme Court of the United States

Brian Burgeson, John Dorner, Brian Foster, Maury Gantman, Raymond Greve, Kelly Jackson, Richard Kim, Laura Loken, Moira Weyrich, Jose Mendez, Timothy McPhillips, Edward Pickell, Edward Plucinski, Maurice Smith, Jeffrey Sulkin, George Velisaris, Mike Wish and Michelle Zimmerman, in their individual capacities,

Petitioners,

v.

Marcella Richman, individually and as Special Administrator of the Estate of Jack B. Richman, deceased,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Petitioners submit this reply brief in support of their petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in *Richman v. Sheahan*, 270 F.3d 430 (7th Cir. 2001). A reply brief is warranted because respondent has overlooked and understated the true breadth of the conflict between the circuits.

I. A CONFLICT EXISTS BETWEEN THREE CIRCUITS REGARDING THE ISSUE OF WHETHER COURTROOM SECURITY PERSONNEL ARE ENTITLED TO QUASI-JUDICIAL ABSOLUTE IMMUNITY FROM SUIT WHEN ENFORCING A JUDICIAL ORDER IN THE COURTROOM.

Respondent concedes that a conflict exists between the Seventh and Eighth Circuits regarding the scope of immunity afforded to bailiffs enforcing a lawful judicial order in the courtroom. *See* Respondent's Brief in Opposition at 8-11. Respondent, however, contends that decisions from the Tenth Circuit support the majority opinion in *Richman*. Respondent overlooks the rationale of the Tenth Circuit's decision in *Valdez v. City of Denver*, 878 F.2d 1285 (10th Cir. 1989) and erroneously relies on the Tenth Circuit's decision in *Martin v. Board of County Commissioners*, 909 F.2d 402 (10th Cir. 1990), an inapposite case that involves the execution of an arrest warrant *outside* the courtroom.

Unlike respondent, Judge Bauer saw the true breadth of the conflict between *Richman* and the other circuits. As he observes, "the tenth circuit case [*Martin v. Board of County Commissioners*] involved police conduct in serving a bench warrant; the eighth circuit case is vir-

tually on all fours with the instant case." *Richman*, 270 F.3d at 443 (Bauer, J., dissenting). *Martin v. Board of County Commissioners* did not consider the scope of immunity afforded to a bailiff enforcing a judge's order in the courtroom and, thus, has no bearing on the instant case.

In *Valdez*, the Tenth Circuit held that a courtroom bailiff had absolute immunity from false arrest and false imprisonment claims brought under the Fourth Amendment for the execution of a contempt order within the courtroom. The rationale of *Valdez* cannot be reconciled with the majority decision in *Richman*.

Respondent concedes that the plaintiffs in *Valdez* challenged the trial judge's contempt order through collateral civil litigation. *See* Respondent's Brief in Opposition at 9 n. 4. Respondent also acknowledges that under this Court's decision in *Mireles v. Waco*, 502 U.S. 9 (1991), the doctrine of absolute immunity precludes a litigant from collaterally attacking an alleged order to use excessive force to seize the litigant and bring him to court. *See* Respondent's Brief in Opposition at 12. Respondent, however, argues that *Valdez* and *Mireles* are distinguishable from the instant case because she challenges the conduct of courtroom security personnel enforcing a judge's order in the courtroom, but not the order itself. This argument begs the question.

Respondent acknowledges that litigants cannot bring a collateral civil lawsuit to challenge a contempt order. Yet, under the rationale of *Richman*, litigants could bring such a collateral civil lawsuit so long as they allege excessive force in the execution of the contempt order. As the Eighth Circuit observed:

> Absolute quasi-judicial immunity would afford only illusory protection if it were lost the moment an officer acted improperly.

Martin v. Hendren, 127 F.3d 720, 722 (8th Cir. 1997).

The majority in *Richman* acknowledged that courtroom bailiffs act as an arm of the court when they enforce a judge's orders. *Richman*, 270 F.3d at 441-442. Under the Eighth Circuit's decision in *Martin v. Hendren* and the rationale of both the Tenth Circuit's decision in *Valdez* and this Court's decision in *Mireles*, a courtroom bailiff is absolutely immune from suit when enforcing a judicial order in the judge's presence within the courtroom. The decision of the Seventh Circuit in *Richman* is contrary.

The Court should grant this petition in order to resolve this very serious conflict.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, the petition should be granted.

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